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William N. Eskridge Jr.

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LEGISLATIVE HISTORY VALUES

WILLIAM N. ESKRIDGE, JR.*

Judicial invocation of legislative history to interpret federal statutes has grown like weeds in a vacant lot during the last hundred years. American courts and commentators for most of the nineteenth century followed the "English Rule" that, "for the purpose of ascertaining the intention of the legislature, no extrinsic fact, prior to the passage of the bill, which is not itself a rule of law or an act of legislation, can be inquired into or in any way taken into view."¹ By the 1890s, a number of American judges and commentators came to believe that "[t]he proceedings of the legislature in reference to the passage of an act," mainly committee reports, "may be taken into consideration in construing the act."² Reliance on such materials grew more widespread in the twentieth century. A leading commentator reported the apparent consensus view in 1940 that "close consideration of extrinsic aids," including committee reports, floor debate, and the evolution of the bill, "is today the dominant feature of the interpretive technique employed by federal judges."³ Since World War II, citation of such material has become commonplace in the federal courts. By 1982, it could be said that "[n]o occasion for statutory construction now exists when the [Supreme] Court will *not* look at the legislative history," including committee hearings, nonpublic documents,

* Professor of Law, Georgetown University Law Center. B.A. Davidson College, 1973; M.A. Harvard University, 1974; J.D. Yale University, 1978. I am grateful to Dan Ernst, Dan Farber, Phil Frickey, and Dick Posner for comments on an earlier draft of this article. Randy Collins, Dixon Osburn, and Bob Schoshinski provided excellent research assistance.

1. T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 247 (1857); see *id.* at 241 (courts cannot "receive evidence of extrinsic facts as to the intention of the legislature; that is, of facts which have taken place at the time of, or prior to, the passage of the bill"); F. DWARRIS, A GENERAL TREATISE ON STATUTES AND THEIR RULES OF CONSTRUCTION 143-45 (1871) (with American Notes & Additions by Justice Platt Potter) (no mention of role for legislative history in construing statutes, obviously influenced by English practice); G. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES (1888) (similar; treatise was "founded" on the prior treatise of Sir Peter Benson Maxwell); J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 380 (1891) [hereinafter J. SUTHERLAND (1st ed.)] (although goal of statutory interpretation is to seek out the legislature's intent, "extrinsic" evidence of the view of individual legislators is not admissible).

2. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 879 (J. Lewis ed., 2d ed. 1904) [hereinafter J. SUTHERLAND (2d ed.)].

3. Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 737 (1940) [hereinafter *Extrinsic Aids*]; see de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527 (1940); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2 (1939) [hereinafter *Plain Meaning Rule*]; Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence*, 20 B.U.L. REV. 601 (1940).

and even oxymoronic "subsequent legislative history."⁴

The conventional story about the Supreme Court's use of legislative history in the olden days is that not much was readily available; the Court didn't use much of what was available; and the commentators approved of an emphasis on statutory text and of the Court's general disregard of "extrinsic" sources. Over time, legislative history has become more plentiful and accessible, and both the Court and commentators have increasingly emphasized it as a useful aid to statutory interpretation. This is, the conventional wisdom goes, a pretty good thing, so long as the Court uses legislative history "critically"—that is, the Court is not tricked by the occasionally manipulative history (the planned colloquy, the packed committee report, the staged hearings).

The conventional story is an oversimplification of the evolution of judicial and academic attitudes toward legislative history. To begin with, the suggestion of a progressive historical march toward using whatever reliable legislative history is available subordinates the doubts about the use of legislative history that even its supporters have had, as well as the substantial opposition to the use of legislative history at various points in its climb to prominence.⁵ Indeed, judicial and academic resistance to the use of legislative history is increasing.⁶ Although the Court does rely on legislative history more often now than it did 40 years ago, there is no reason to believe that the Court will rely on such history nearly as much 40 years from now.⁷

Additionally, the intellectual structure by which the Court and commentators justify the relevance of legislative history has evolved over time. There has been some change, of emphasis at least, in the values that legislative history is viewed as serving, and these supposed values are

4. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1982); see also Carro & Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982) (over 40-year period, Supreme Court reliance on legislative history increased almost geometrically).

5. Justices Holmes (1902-30), Brandeis (1916-38), Jackson (1938-55), and Scalia (1986-) have all raised serious objections to the use of legislative history from within the Court.

6. *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

7. Or even four years from now. There is some movement on the Court toward less reliance on legislative history, gratia Justices Scalia. In the 1986 Term, when Justice Scalia began his service, the Court found a statutory "plain meaning" in 28 statutory cases, and in 18 of those cases (over three-fifths of those cases) examined the legislative history notwithstanding the apparently clear text; in at least seven cases, the court trumped the apparent plain meaning of the statute, at least in part by relying on legislative history. Contrast the 1988 Term, when Justice Scalia was joined by Justice Kennedy: the Court found plain meaning in 32 statutory cases, yet only looked at the legislative history in 11 (about a third); in only four cases did the Court displace an apparently plain meaning by reference to legislative history. Eskridge, *supra* note 6, at 657 (table 1).

linked up to different jurisprudential assumptions. This article will explore the evolution of legislative history theories by tracing the rise and critiques of three different values theorists have found in legislative history.

The early justifications for relying on legislative history emphasized its *authority value*, that is, its value in telling us what the sovereign legislature has commanded of us. As a matter of interpretive rhetoric, the interpreter asks the legislative history to tell what the "specific intent" of the legislature was when it passed the statute. The value underlying legislative history as evidence of specific intent was subjected to critique by the Legal Realists and their intellectual relatives early in this century. Part I of this article traces the intellectual roots of legislative history's authority value and outlines the Realist critiques, as updated by modern theory.

Some of the Realists and scholars of the emerging Legal Process School, responding to these critiques, developed a different theory in the late 1930s and 1940s. This theory emphasized the *purpose value* of legislative history, its ability to suggest statutory goals and purposes, so that the interpreter can better apply the statute to new situations. As a matter of interpretive rhetoric, the Court seeks from the legislative history the "general intent" of Congress when it passed the statute. Legislative history as evidence of general intent has been the leading academic defense and has been routinely invoked by the Court (especially since the 1940s), but it has itself been subjected to critique in the 1970s and 1980s. Part II of this article explores the morphogenesis and critique of legislative history's purpose value.

We are now moving into an era, in which no single theory currently dominates academic discussion of legislative history. On the one hand the New Textualism builds upon Legal Realist and Law and Economics critiques to urge the substantial abandonment of legislative history as a source of guidance in statutory interpretation. On the other hand, Normativist scholars suggest that legislative history, if examined critically, has a *truth value*. That is, the interpreter can learn much from the legislative history about the "best" answer that can be quarried from the statute. As a matter of interpretive rhetoric, the interpreter seeks from the legislative history the "meta-intent," or background assumptions, which can then be applied and updated in the current case. Legislative history as evidence of meta-intent is a response to the problems with earlier theories, and it seeks to turn the problems with earlier theories to productive advantage. The Court has not consciously adopted this rhetoric, but the truth value is implicit in many of its opinions. Part III

explores this newest twist in legislative history theory, as well as inherent problems with the newer theories.

The analysis in this article is of more than historical interest, because all three values of legislative history influence the Supreme Court's current practice in statutory interpretation. I shall explore this idea through a recent Supreme Court decision, *Green v. Bock Laundry Machine Company*.⁸ The relevant statute is Rule 609(a) of the Federal Rules of Evidence, which in 1989 provided:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The plaintiff, Paul Green, sued defendant Bock Laundry for providing allegedly inadequate instructions for the use of its laundry dryer. Bock Laundry impeached Green's testimony at trial, *inter alia*, by referring to his felony convictions, and Green appealed the defendant's verdict on this and other grounds.

Green argued that it was unjust to admit evidence of his prior felony convictions without considering whether their slight probative value was outweighed by their considerable prejudicial value. Bock Laundry argued that Rule 609(a)(1) precluded any such balancing, except when a *defendant's* prior convictions were at issue (Green, of course, was a plaintiff). The Supreme Court, in an opinion by Justice John Paul Stevens, conceded that Rule 609(a)(1) was a strange-looking rule of evidence. The Rule seemed to treat plaintiffs and defendants differently in civil cases: so long as they are not *crimen falsi* (convictions involving untruthfulness, covered by Rule 609(a)(2)), defendants could exclude their prior convictions if their probative value were outweighed by their prejudicial effect, but plaintiffs could not. The Court concluded that Rule 609(a)(1) cannot constitutionally have this effect.⁹

How should Rule 609(a)(1) have been read? The Court engaged in a lengthy examination of Rule 609(a)'s legislative history, including the common-law rule that such impeaching evidence is routinely admissible, and its widespread criticism; the proposed Advisory Committee Rule,

8. 490 U.S. 504 (1989).

9. *Id.* at 511.

which simply followed the common-law approach in its first draft, renounced it in the second draft, and finally re-embraced the common-law approach in its third and final draft; hearings, committee reports, and floor debate from the House of Representatives which rejected the Advisory Committee's approach and voted for restricted admissibility in both civil and criminal cases; the Senate committee report and floor debate, which led to the Senate's voting for the Advisory Committee's final approach; and the conference committee report, which reached an ambiguous compromise.¹⁰ Based upon this legislative history, the Court found that Congress "intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1)."¹¹ Based upon the same legislative history, three dissenting Justices found that Congress intended that any party in a civil case can rely on the balancing approach of Rule 609(a)(1), and that Green's convictions were inadmissible. Justice Antonin Scalia agreed with the Court's result but refused to credit the legislative history arguments.

Bock Laundry suggests that the historical debate over the value of legislative history is of practical importance today. The Supreme Court (and by implication other federal courts) will consider legislative history as valuable evidence of legislative intent. But that generalization is complicated by the three different values legislative history has for the Justices, the different kinds of legislative intent that such history might illuminate, and the criticisms that have developed for each value and each type of legislative intent.

I. AUTHORITY VALUE: LEGISLATIVE HISTORY AS EVIDENCE OF SPECIFIC LEGISLATIVE INTENT

The *Bock Laundry* majority consciously invoked the authority value of legislative history as evidence of specific legislative intent. The Court conceded that Green's position indeed may be the better rule.¹² Nonetheless, the Court felt its role in the case was "not to fashion the rule we deem desirable but to identify the rule that Congress fashioned."¹³ To ascertain the rule "that Congress fashioned," the Court examined the legislative history for its authority value, as evidence of specific legislative intent about the meaning of Rule 609(a)(1).

Legislative history as evidence of specific intent is, historically, the

10. *Id.* at 511-24.

11. *Id.* at 524.

12. *Id.* at 508 & n.4.

13. *Id.* at 508.

main justification for examining such materials. The Court examines legislative history because it contains authoritative statements of what the sovereign legislature commands. That is, the legislature enacts statutes that we must obey. But statutory language is often unclear, and even when it is technically clear it may be a drafting mistake, as Rule 609(a)(1) apparently was. To make sure they are reading the legislative commands correctly, courts will consult the legislative history as the authoritative background context of the statute. The intellectual assumptions underlying this authority value of legislative history are the following: (1) law is the command of the sovereign (the positivism assumption); (2) the sovereign in our representative democracy is the legislature (or people, and derivatively is the majority-elected legislature), and courts are only the agents of the legislature (the legislative sovereignty assumption); and (3) courts best fulfill their agency responsibilities by discerning the subjective desires of the sovereign, what the members of the legislature actually intended in specific instances (the subjectivism assumption).

This intellectual tradition and its assumptions are linked to the development of Mechanical Jurisprudence at the end of the nineteenth century.¹⁴ In the middle of the nineteenth century, American judges and commentators accepted the positivism and legislative sovereignty assumptions. They considered the inquiry in statutory interpretation to be to determine what the legislature commands, and indeed they spoke of implementing legislative intent.¹⁵ But for the most part they found legislative intent to be an objective construct, namely, the command manifested in the statute itself, related statutes, subsequent elaboration by the legislature and the courts, and even customary usage.¹⁶ Thus, they did not accept the subjectivism assumption, and did not consider evidence of what legislators specifically expected a statute to mean in a particular case.

The late nineteenth century saw the rise of more subjectivist approaches to law in several areas. Courts adopted the *mens rea* requirement in criminal law, the subjective malice test for punitive damages, and the meeting of the minds metaphor in contract law during this period. A similar movement occurred in statutory interpretation, and indeed the

14. See generally Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 VAL. U.L. REV. 287 (1985).

15. E.g., T. SEDGWICK, *supra* note 1, at 231 ("the object and the only object of judicial investigation, in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of the legislature which framed the statute" (emphasis in original)).

16. *Id.* at 243-59; see F. DWARRIS, *supra* note 1, at 143-45.

turning point can be located in the 1890s. The first edition of the celebrated Sutherland treatise in 1891 reported that the intent of the law is "the vital part, the essence of the law,"¹⁷ but followed earlier treatises and the English approach in declining to look at extrinsic facts (legislative history) to establish such intent.¹⁸ In 1892, the Supreme Court in *Church of the Holy Trinity v. United States*¹⁹ relied on a committee report to rewrite an immigration statute. The case was a sensation among the commentators, not just because it was a Supreme Court decision, but presumably because it fit the era's changing notions of intent. The second edition of the Sutherland treatise, published in 1904, reflected this change by announcing that "proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act."²⁰ Although it waffled from case to case, the Supreme Court gradually came to rely on legislative history—mainly committee reports—to confirm the original intentions of the legislators who passed statutes.²¹

Therefore, the Court in *Bock Laundry* was following a one-hundred-year-old tradition when it turned to the legislative history to ascertain how the legislature specifically intended Rule 609(a)(1) to be applied. Yet, from the early years of this century, the authority value of legislative history has been subject to biting intellectual attack. Indeed, that counter-tradition is also well-represented in *Bock Laundry*. Concurring in the judgment, Justice Scalia belittled the Court's use of legislative history and argued that such materials have no authority value.²² Dissent-

17. J. SUTHERLAND (1st ed.), *supra* note 1, at 309.

18. "The court will not hear proof of extrinsic facts known to the legislature or members thereof which are supposed to indicate their intention in passing a law." *Id.* at 380; *see id.* at 383-84 (following English approach of looking at reports of blue-ribbon commissions proposing legislation and journals, but not at "declarations of members of legislative bodies").

19. 143 U.S. 457 (1892) (reinterpreting statutory language to avoid absurd result, and relying heavily on committee report).

20. J. SUTHERLAND (2nd ed.), *supra* note 2, at 879; *see id.* at 880-83 (citing *Holy Trinity Church* to support reference to committee reports and petitions, and citing *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1896), for the view that legislative debates were still inadmissible).

21. For early cases, see *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-77 (1921) (statement of House floor manager "uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition . . . [the Clayton Act] would not have been enacted in the form in which it was reported"); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911) (legislative debates, though only to suggest general purpose of statute); *Binns v. United States*, 194 U.S. 486, 495 (1904) (committee report and explanatory statement by committee member). Consider also *Caminetti v. United States*, 242 U.S. 470, 490 (1917), where the Court noted that "[r]eports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation," but refused to bend what it thought was a clear text in light of general legislative history.

22. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). For an early version of his "New Textualism," see A. Scalia, Speech on Use of Legislative History, presented at various law schools (1985-86) [hereinafter SCALIA, LEGISLATIVE HISTORY SPEECH].

ing Justices William Brennan, Thurgood Marshall, and Harry Blackmun argued that legislative materials are more useful for their purpose value and therefore should not have been read so literally.²³

The debate over the authority value of the legislative materials in *Bock Laundry* is rooted in history. The Legal Realists and subsequent critics have set forth three different critiques against the use of legislative history as evidence of specific intent. First, the constitutional critique argues that the use of legislative history as evidence of the legislature's specific intent is inconsistent with our Constitution's text and its traditions. Second, the political theory critique argues that legislative history is not reliable evidence of specific legislative intent and, as a result, cannot be considered authoritative under the assumptions of its accompanying theory. Third, the jurisprudential critique questions authority value's three assumptions and argues that statutory interpretation involves something more than discerning and implementing the legislature's commands.

A. *The Constitutional Critique*

The constitutional critique argues that the specific intention of the legislature has no authority value, because only the words of the statute have authority value. As Justice Oliver Wendell Holmes, Jr. put it, "We do not inquire what the legislature meant; we ask only what the statute means."²⁴ Holmes' point is that there must be an objectivity to law, lest it violate the underlying constitutional norm that our government is a "government of laws, and not men."²⁵

The Legal Realists, notably Max Radin, debunked legislative history's authority value and argued that its use to discern specific legislative intent violates the constitutional separation of powers.²⁶ Under the Constitution's allocation of power in Articles I-III, Radin argued, the function of the legislature (Article I) "is not to impose [its] will even within limits on [its] fellow-citizens, but to 'pass statutes,' which is a fairly precise operation," involving the promulgation of words with oper-

23. *Green*, 490 U.S. at 533-35 (Blackmun, J., dissenting).

24. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899), reprinted in COLLECTED LEGAL PAPERS 207 (1920). Virtually every leading statement of the constitutional critique quotes this Holmesianism. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) [hereinafter *Original Intent*]; SCALIA, LEGISLATIVE HISTORY SPEECH, *supra* note 22, at 17.

25. See SCALIA, LEGISLATIVE HISTORY SPEECH, *supra* note 22, at 15-16.

26. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930).

ative effects. "And once the words are out, recorded, engrossed, registered, proclaimed, inscribed in bronze, they in turn become instrumentalities which administrators and courts use in performing their own specialized functions."²⁷ In short, an approach to statutory interpretation which views the legislature as having predetermined the interpretation of its statute in certain cases confuses the specialized functions of the legislature (writing statutes) and the courts (interpreting statutes in concrete cases).

Subsequent constitutional critics, notably Judge Frank Easterbrook, have emphasized that the use of legislative history as evidence of specific intent is in tension with the Constitution's procedures for passing statutes.²⁸ Any intentions that members of Congress might have at any point in time do not have the force of law unless they have been embodied in a bill that has been adopted in the same form by both Houses of Congress (the bicameralism requirement) and signed by the President, or not vetoed by the President within ten days while Congress is in session, or passed by a super-majority over a presidential veto (the presentment requirement).²⁹ "It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some *evidence* about the law, while the *real* source of legal rules is the mental processes of legislators."³⁰

Justice Scalia's *Bock Laundry* concurrence is written against the background of these three types of constitutional problems with the Court's using legislative history as evidence of specific legislative intent: legislative history has no authority value, because that might violate the Constitution's foundational assumption that we have a government of laws, and not of "men"; separation of powers, in which the legislature does not control the interpretation of laws; and Article I structures of lawmaking. For Justice Scalia, these constitutional précepts instead suggest the following approach:

27. *Id.* at 871.

28. *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989); Easterbrook, *supra* note 24. Others who have raised this argument include Justice Robert Jackson (*see* Schwegmann Bros., 341 U.S. at 395-96 (Jackson, J., concurring)) and Justice Scalia (*see* *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring); SCALIA, LEGISLATIVE HISTORY SPEECH, *supra* note 22). *See also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 26-33, 47-50 (Jan. 5, 1989) [hereinafter DEP'T OF JUSTICE LEGISLATIVE HISTORY REPORT], which is largely derivative of the Easterbrook-Scalia criticisms.

29. U.S. CONST. art. I, § 7.

30. *In re Sinclair*, 870 F.2d at 1344; *see Thompson*, 484 U.S. at 191-92 (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (citations omitted)).

[T]he meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.³¹

This constitutional critique is a powerful one.³² But the critique has not gone unanswered, and in fact the 1930 article by Radin was answered in the same issue of the *Harvard Law Review* by Professor (later Dean) James Landis.³³ Landis and subsequent defenders of legislative history as evidence of specific intent have (in my opinion) effectively responded to the constitutional critique. They respond that: (1) legislative history does not carry with it the authority of law, but is the most valuable contextual evidence of what the law requires; (2) authorial intent is a more objective, more reliable source of statutory meaning than textual analysis standing alone; and (3) a strict textualist approach which ignores legislative history tends to be incoherent in both theory and practice.

1. Legislative History as Context

The first response is one of confession and avoidance: no one claims that legislative history has the same authority value as the statutory text, and no one denies that interpreting texts demands contextual evidence. The question is whether legislative history is appropriate contextual evidence, and defenders argue that it is.³⁴ Hence, defenders of legislative history as contextual evidence do not argue that the committee report is the law, but only that the committee report is an authoritative context

31. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (Scalia, J., concurring). He continued: "I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest."

32. This is not to suggest that textualists would simply outlaw all use of legislative history (though some may take that position in the future). Under their approach, legislative history might be useful, as it was to Justice Scalia in *Bock Laundry*, to confirm that an apparent "absurd" statutory meaning was never assumed or proposed by anyone. 490 U.S. at 528 (Scalia, J., concurring). Such history also might be useful when the statute is genuinely ambiguous, but only as contextual evidence of what the statute might mean, not as truly authoritative evidence of what Congress intended.

33. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

34. Indeed, the old nineteenth century treatises introduced "extrinsic evidence" (legislative history) as simply more context for statutory interpretation, in addition to ordinary rules of grammar and word usage, the whole act, statutes in *pari materia*, and the statute's common-law background. Compare J. SUTHERLAND (1st ed.), *supra* note 1, at 309-434 (traditional sources, excluding legislative history) with J. SUTHERLAND (2d ed.), *supra* note 2, at 879-83 (same, but including legislative history).

for choosing among alternative meanings of the text. Viewed in this way, legislative history supports rather than undermines the objectivity of law.

If legislative history is simply evidence contributing to the Court's understanding of a statute, it is hardly legislative usurpation of judicial duties. Indeed, its connection to the legislative process that produced the statute renders it truly useful to the interpreter. Rule 609(a)(1) is a puzzling statute, and a great deal of legislative discussion focused on that Rule. Just as a court might attend to evidence of the grantor's original expectations when interpreting a trust or to the principal's original expectations when interpreting directives to an agent, so too a court might find legislative expectations relevant to interpreting a statute written by the legislature.³⁵

The most troubling constitutional objection to the legislative history's authority value is the Article I problem. Nonetheless, so long as legislative history is simply viewed as context, it does not violate the bicameralism and presentment requirements of Article I as they have been interpreted by the Supreme Court in *INS v. Chadha*.³⁶ Itself quoting a Senate committee report, *Chadha* held that the bicameralism and presentment requirements are only formally applicable when "actions taken by either House . . . contain matter which is properly regarded as legislative in its character and effect,"³⁷ namely, to alter legal rights and duties. As a formal matter, committee reports consulted to explain the meaning of the statute do not themselves seek to alter legal rights and duties, and consulting them does not violate bicameralism or presentment any more than would consulting a dictionary. *Chadha* further emphasized that these were only limitations on *Congress'* actions (the requirements are in Article I), and not on the branches of government regulated by Articles II and III.³⁸ Bicameralism and presentment are not formally relevant as a limitation on subsequent implementation and interpretation of legislation.³⁹

35. See Johnson & Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamics Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545 (1989).

36. 462 U.S. 919 (1982).

37. *Id.* at 952 (quoting S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897)).

38. See *id.* at 953 n.116 (explaining that executive implementation of statutes, even if changing legal rights and duties is not covered by Article I).

39. The arguments against the New Textualism's constitutional attacks on legislative history are explored more thoroughly in Eskridge, *supra* note 6, at 670-78.

2. Authorial Intent as the Most Objective Evidence of Textual Meaning

Defenders of legislative history also argue that if one wants an objectively determinable method for discerning textual meaning, consideration of original intent (as revealed by the text *and* legislative history) is superior to consideration of the text alone. If all interpretation depends upon shared context, as appears to be the case, then the issue becomes choosing the most reliable or objectively determinable shared context—that which would have been most accessible to members of Congress voting on the bill, the President signing it into law, and judges interpreting it over time. Defenders of the use of legislative history may offer more authoritative contextual evidence than the materials emphasized by textualist critics.⁴⁰ Textualists tend to rely on horizontal context, that is, the current version of the statutory provision, the whole act, related statutes, and existing canons of construction. Defenders of legislative history as evidence of specific intent tend to rely on vertical context, that is, the origins of the statute, its progress through the legislative process, and its subsequent elaboration.⁴¹ Which type of context is more reliable?

Justice Scalia in *Bock Laundry* overstates the case for relying *only* on horizontal context. He argues against exploring the complicated background of Rule 609(a)(1), because such “minute details” would not have been accessible to members of Congress (or, presumably, the President).⁴² That claim is questionable. The materials upon which Justice Stevens relied—Advisory Committee drafts, committee reports of both chambers, and the conference report—were not considered minute details by the legislators who debated Rule 609. In fact, the interlocutors revealed an impressive grasp of the issues raised by these materials, all of which were available to the legislators when they voted on the bill and the President when he signed the bill into law.⁴³

40. Note the very impressive body of modern interpretive theory arguing that authorial intent is the only reliable method for interpreting literary texts. See E. HIRSCH, JR., *THE AIMS OF INTERPRETATION* (1976); Knapp & Michaels, *Against Theory*, 8 CRIT. INQ. 723 (1982). Defenders of legislative history as evidence of specific intent might claim that such arguments have special relevance in statutory interpretation.

41. The horizontal/vertical context distinction was developed in Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 116, 120, 122-24 (1988).

42. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (Scalia, J., concurring).

43. For example, during the critical debate in the Senate over Senator McClellan's amendment, the interlocutors heavily relied on or referred to the Advisory Committee position, the position adopted by the House, and the position of the Senate committee. See 120 CONG. REC. 37,076 (1974) (Sen. McClellan); *id.* at 37,077-78 (Sen. Hart); *id.* at 37,079 (Sen. Burdick); *id.* at 37,080 (Sen. Kennedy). Seventy Senators voted on the McClellan amendment's first consideration (which failed on a tie vote), and 73 voted on its reconsideration. If these Senators had considered anything, they would

Contrast the evidence Justice Scalia announced in *Bock Laundry* that he would consider—the text of the statute, the whole statute, and related provisions, including those enacted subsequently. Is it not even less likely that members of Congress voting on the bill, or the President signing it, would be aware of other statutory provisions, especially ones not yet enacted? Justice Scalia admits that this is a “fiction,” albeit a “benign” one, but is it not at least as justifiable a fiction to assume that members of Congress can read committee reports to educate themselves about a proposed bill? There is substantial evidence from political science that members are more likely to read the committee report than the bill itself.⁴⁴

Textualist critics also tend to overstate the ease with which language conventions can yield plain meaning in statutory texts over a period of time. One of the critics' favorite cases is *Caminetti v. United States*.⁴⁵ A federal statute made it a crime knowingly to transport any girl or woman in interstate commerce for the purpose of prostitution or debauchery, or “for any other immoral purpose.”⁴⁶ The Supreme Court held that the “ordinary and usual sense” of the statute criminalized two defendants' for transporting their mistresses across state lines. The Court rejected the relevance of the legislative history upon which the dissenting Justices relied. The House report, for example, indicated that the statute was aimed “solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a line of prostitution.”⁴⁷ *Caminetti* hardly strikes me as following any kind of objectively determinable meaning. Indeed, it seems arbitrary. There is nothing in the phrase “immoral purposes” that targets transporting one's lover, and several canons of construction counsel against an expansive reading of the residual phrase.⁴⁸ The Court's

have considered the documents Justice Stevens emphasized in *Bock Laundry*. These same documents, plus the conference report, were critical in the final debate on the bill. See *id.* at 40,890-96.

44. See, e.g., W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 94, 92d ed. (1984); E. REDMAN, THE DANCE OF LEGISLATION 140 (1973).

45. 242 U.S. 470 (1917), cited approvingly for the textualist position in *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring); *In re Sinclair*, 870 F.2d 1340, 1342, 1344 (7th Cir. 1989) (Easterbrook, J.). However, DEP'T OF JUSTICE LEGISLATIVE HISTORY REPORT, *supra* note 28, at 62-63, admits that *Caminetti* is excessively literalistic.

46. Act of June 25, 1910, ch. 395, 36 Stat. 825 (codified at 18 U.S.C. § 2421 (1970)), amended by Pub. L. 99-628, 5(b)(1), Nov. 7, 1986, 100 Stat. 3511 (Supp. 1991) (textual quotes omitted in amended statute).

47. H.R. REP. NO. 47, 61st Cong., 2d Sess. 10, quoted in *Caminetti*, 242 U.S. at 498 (McKenna, J., dissenting).

48. Namely, *ejusdem generis* (the rule that an item in a list will usually be taken as being of the same genre or class as the other items), *noscitur a sociis* (the rule that a thing shall be known by its associates), and the rule of lenity, all discussed in W. ESKRIDGE & P. FRICKEY, STATUTES AND THE CREATION OF PUBLIC POLICY 639-41, 658-76 (1988).

interpretation seems to be scarcely anything more than its own value judgment that having a mistress is immoral. If there were an objectively determinable meaning of the phrase "for any other immoral purpose," it would be that suggested by the legislative history, not that suggested by the Court's quaint view of the statutory text.

3. The Quandry of Absurd Results

A final difficulty with the constitutional critique is the problem of absurd results. That is, there are a fair number of cases where the statute plainly commands a silly result. If legislative history has some authority value, it can demonstrate that Congress never intended the absurd result, and hence relieve the Court of having to reach such a result. On the other hand, if the constitutional critique is right and clear texts must be enforced as written, there seems little choice but to interpret the statute in a bizarre way. Yet even the most ardent textualists admit an exception for absurd results. That is inconsistent with their theory. In order to bend statutes to avoid absurd results, one either has to accept the subjectivism assumption or reject the positivism or legislative sovereignty assumptions. Either course of action is perilous for the textualist critic of legislative history's authority value.

On the one hand, if the textualist critic accepts the subjectivism assumption for absurd result cases, it is hard to reject that assumption for cases where the result is unreasonable or where there was probably a drafting error. Yet such a move is tantamount to abandoning the textualist position, since there are a great many cases where the apparent textual meaning is unreasonable. On the other hand, if the textualist critic instead abandons the legislative sovereignty or positivism assumptions for absurd result cases (this is too unreasonable for the Court to let Congress get away with), that critic not only has a hard time distinguishing absurd result from unreasonable result cases, but has abandoned the entire theory. The legislature is not supreme unless it is always supreme, and law is not the command of the sovereign unless it is always so.

Thus, Rule 609(a)(1), at issue in *Bock Laundry*, literally discriminates between civil plaintiffs and civil defendants. It permits introducing serious criminal convictions not involving dishonesty only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." The plaintiff's (or plaintiff's witness') criminal convictions, of course, will almost always pass this test and hence be admitted, while the defendant's (or defendant's witness') convictions often will not. This is a relatively clear legislative command,

yet even arch-textualist Justice Scalia admitted that the statute could not be enforced literally, though he cannot explain why. The rule is pretty clear and would be easy to administer. Its discrimination against civil plaintiffs might well be unconstitutional, but in that event Rule 609(a)(1)'s discrimination against civil plaintiffs should have been invalidated and Green's convictions excluded from evidence based upon the balancing inquiry.⁴⁹ That result strikes me as just, yet Justice Scalia agreed to rewrite the statute, apparently in order to effectuate legislative intent.⁵⁰

And, then, I think Justice Scalia was tripped up by an arbitrary approach to the statutory text. He claimed he was rewriting the statute in a way that "does least violence to the text."⁵¹ To justify that claim, Justice Scalia claimed that he was rewriting the text to cover "prejudicial effect to the *criminal* defendant" (adding the new italicized word), whereas the dissent would rewrite the text to cover "prejudicial effect to the *civil plaintiff, civil defendant, government in a criminal case, and criminal defendant*" (adding several new italicized words). Of course, the dissent's approach looks like a violent rewriting of the text—until one realizes that the dissent would actually rewrite the text to say "prejudicial effect to a *party*" (replacing defendant with party). A fair presentation makes it unclear whether the dissenters rewrote the text any more than Justice Scalia.

B. The Political Theory Critique

The political theory critique argues that even if statutory interpretation were a search for specific legislative intent, legislative history is not reliable evidence of such intent. The Legal Realists, especially Radin, suggested this critique,⁵² and subsequent developments in political theory (especially public choice theory) have lent support to the Realists' critique.⁵³ Defenders of legislative history's authority value have responded

49. Note here that the canon of avoiding constitutional issues, see *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), is not applicable when the statute is clear. *E.g.*, *United States v. Albertini*, 472 U.S. 675, 680 (1985).

50. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 529 (Scalia, J., concurring) ("entirely appropriate" to look at legislative history "to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought-of").

51. *Id.*

52. The classic explication of this critique is Radin, *supra* note 26. See also R. DWORKIN, *How to Read the Civil Rights Act*, in *A MATTER OF PRINCIPLE* 316 (1985); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985). The equally classic response is Landis, *supra* note 33. See also R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 67-78 (1975); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966).

53. Modern public choice theory, the application of game theory and economic concepts to

to these arguments, but over time the political theory arguments have grown more powerful and the defenders' position has given away much of legislative history's claim to authority. In my view, the political theory critique has been more successful than the constitutional critique.

1. Strong Intentionalism—Actual Intent

If we were to value legislative intent for its authority value, the most obvious meaning of legislative intent would be the actual intent a majority of legislators in each chamber had in mind when they passed the statute. Such actual intent is the paradigm that Radin set up for his classic critique in 1930. In it, he raised three problems with what I call "strong intentionalism."⁵⁴

First is the problem of indeterminacy. When most members of Congress vote on a bill, it is doubtful that they have a specific intent on more than a few salient issues.⁵⁵ Even if members did have specific intentions about certain issues, those intentions often change in the process of getting the bill through Congress. And even if members have unchanging specific intentions about an issue, those intentions are often unknowable from the historical record, which reveals the preferences of few members.

Second is the problem of aggregating intent. Radin argued that it is very hard to say that a collective body has a meaningful "intent" on any given issue beyond its objectively manifested words and deeds.⁵⁶ This is especially difficult for legislation, because one must aggregate the preferences not only of large groups of people, but of two different collections of people (the House and Senate). Furthermore, the aggregation of the preferences of those two groups also has to match the intent of the President who signs the bill. If these problems were not enough, modern theories of "majority cycling" suggest that in many instances there are several different outcomes within any voting process that follow simple, pairwise majority voting schemes.⁵⁷ That a majority in a legislative body

politics, has enriched the array of arguments available to the realist critique. The classic explications are D. FARBER & P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38-67, 88-115 (1991); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). See also Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 289 (1988); SCALIA, *LEGISLATIVE HISTORY SPEECH*, *supra* note 22.

54. See Radin, *supra* note 26, at 870-71.

55. Many members will have a specific intent on no issue, because all they intend to do when they vote for a bill is to see it become law. Members may vote for legislation simply because their President, their party, or their interest group supporters favor the bill.

56. Radin, *supra* note 26, at 870-71.

57. The classics are K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963), and D. BLACK, *THE THEORIES OF COMMITTEES AND ELECTIONS* (1958). For application of these theories to statutory interpretation, see Shepsle, *Legislative Intent as Oxymoron*, — J. INT'L L. & ECON. — (1992) (forthcoming). See also FARBER & FRICKEY, *supra* note 53; Easterbrook, *supra* note 53.

voted for a certain provision is not conclusive evidence that they prefer that provision over all competing ones.

Third is the problem of strategic behavior. Members' statements of their preferences may not be perfectly reliable. Statements of individual legislators during hearings and floor debate on proposed legislation are especially unreliable, because they are often nothing more than strategic posturing. Indeed, they are often just inserts written up entirely after the fact.⁵⁸ Even committee reports, long considered the most reliable legislative history, have been attacked as unreliable on the grounds that they are written by staff, and are not necessarily even read by legislators on the committee. They may even contain strategic insertions designed to produce a judicial interpretation that did not have enough votes to be written into the statutory text.⁵⁹

All of Radin's problems are on display in *Bock Laundry*. Consider the fate of Rule 609(a)(1) in the Senate. The Judiciary Committee proposed to exclude impeachment by prior felonies not involving falsehoods when a criminal defendant is testifying, *or* when any other kind of witness is testifying and the prejudicial value of the evidence outweighs its probative value.⁶⁰ Senator McClellan proposed an amendment making all such felony convictions admissible.⁶¹ The vote on Senator McClellan's amendment was 35 to 35, and the amendment failed.⁶² On reconsideration, his amendment was adopted, 38 to 34.⁶³ In conference, the Senate agreed to a compromise proposal, which became the current version of Rule 609(a)(1).

What the Senate intended is indeterminate. The preference of many Senators is quite unclear. Senator Stevens, for example, voted against the McClellan amendment, then voted to reconsider, then voted for the amendment, and (at the end) voted for the final bill. It is completely unclear what his intent *ever* was on the Rule 609(a)(1) issue, and if he harbored any intent it apparently changed, given his different votes. Even if one might determine the preference of individual Senators, it is very hard to aggregate their preferences on this issue. Although the Senate adopted the McClellan amendment, it is far from clear that the

58. See R. DICKERSON, *supra* note 52, at 155-56.

59. See SCALIA, LEGISLATIVE HISTORY SPEECH, *supra* note 22.

60. S. REP. NO. 1277, 93d Cong., 2d Sess. 14-15 (1974) [hereinafter SENATE REPORT].

61. 120 CONG. REC. 37,075-76 (1974).

62. *Id.* at 37,080.

63. *Id.* at 37,083. The different numbers are the result of the following: two Senators (Gurney and Stennis) who had been absent on the first vote voted for the McClellan amendment on reconsideration; two Senators (Stevens and McIntyre) who had voted against the McClellan amendment on the first vote voted for it on reconsideration; one Senator (Moss) who had voted for the McClellan amendment on the first vote voted against it on reconsideration.

amendment reflected the preferences of the Senate. After all, it was originally defeated on a tie vote. It was later adopted, mainly because Senators Stevens and McIntyre changed their votes from "against" to "for" the amendment. We do not know why they changed their votes, or why certain senators did not vote. They could have been acting strategically and not sincerely, perhaps pursuant to a secret logroll for all we know.

Finally, it seems quite probable that the McClellan amendment would have failed if it had been paired up against a more moderate committee proposal, and that would have significantly affected the statutory result.⁶⁴ The indeterminacy of strong intentionalism for settling the *Bock Laundry* issue is especially significant, for this was not a counterfactual issue (as is usually the case)—it was an issue about which Congress specifically debated and voted.

2. Weak Intentionalism—Conventional Intent

To a certain extent, Radin was attacking a strawman by his focus on actual intent. Landis responded that Radin's critique "disregard[s] the realities of the legislative procedure." To wit: "[T]hrough the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent [when other members vote for a bill] becomes in reality a concurrence in the expressed views of another."⁶⁵ Also, at various points in the legislative process—in committee, on the floor, in conference—choices are made, and certain approaches are rejected. That, too, is good evidence of "a real and not a fictitious intent and should be deemed to govern questions of construction."⁶⁶

What Landis and other defenders are doing is to create a set of "conventions" that can be presumed to reflect a collective intent, if any such intent indeed exists. These conventions, they would argue, are based upon a solid foundation in legislative procedure: legislators have delegated the detail and creative work on legislation to committees and sponsors. Therefore, if the bill passes unamended, their statements about the legislation can be taken as having been accepted by the majority.

64. For example, if the Senate Judiciary Committee had proposed a balancing test for convictions used to impeach criminal defendants and otherwise admitted convictions (the rule created in *Bock Laundry*), I think it likely that the McClellan amendment would have failed. In that event, the Senate/House compromise would probably have been more liberal, given the substantially more liberal position of the House version. In short, a slightly different Senate agenda could very well have yielded a very different legislative compromise.

65. Landis, *supra* note 33, at 888-89 (citations omitted); see a more recent version of this position in R. DICKERSON, *supra* note 52, at 71-82 (responding to Radin's arguments).

66. Landis, *supra* note 33, at 890; see Jones, *Extrinsic Aids*, *supra* note 3, at 742 (legislative intent is not the actual "will" of Congress, but only a "fiction" representing the general understanding of legislators when a statute was enacted).

When the delegated subgroups or one of the chambers itself rejects proposed language, that probably means that the thrust of the rejected language is not part of the legislation. The members' votes on the bill or the rejected proposal are an implicit assent to this conventional wisdom. Hence, defenders do not have to argue vote-counting issues to invoke legislative history as evidence of specific intent. *Bock Laundry* itself made no pretense of counting votes and instead relied on the related convention that any big change in the status quo will probably be noted quite explicitly, even dramatically, in the legislative process.⁶⁷ Since neither the conference report nor subsequent floor debate suggested that the compromise version of Rule 609(a)(1) was a major departure from the common-law rule, the Court presumed that this was *probably* the compromise that must have been struck in conference.

Although the Realists did not have theories of the legislative process to respond to this account in the 1930s,⁶⁸ modern legislative process theory suggests some reason to doubt that these conventions really are adequate surrogates for actual intent. Indeed, there is reason to believe that these conventions are distorting much of the time. Consider committee reports and sponsor statements, generally considered the most authoritative legislative history, based upon the convention of legislative delegation.⁶⁹ To begin with, these players may not be representative of Congress as a whole. Surely this is obvious for sponsors or managers of bills, and political science studies suggest the same may be true for committees. Members seek committees which are related to the interests of their constituents, and are successful in obtaining the assignments that they desire. This process of self-selection skews the overall preferences of many, and perhaps most, committees toward narrow interests.⁷⁰ For a notorious example, members from farm districts often desire placement

67. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." 490 U.S. at 521.

68. For example, Radin's later response to Landis was simply to confess that his own statements were "undoubtedly somewhat too sweeping . . . I intended then—and I certainly should like to take the position now—that [legislative materials] are neither irrelevant nor incompetent, but that they are in no sense controlling." Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 410-11 (1942).

69. "But in the absence of evidence either way as to the construction placed upon a statute by the Congressional membership generally, the courts should recognize the degree to which committee specialization has become characteristic of the legislative process and should give weight to a discovered committee understanding, even though the particular point of statutory meaning was never reported, formally, to the Congress as a whole." Jones, *Extrinsic Aids*, *supra* note 3, at 748-49.

70. See R. FENNO, CONGRESSMEN IN COMMITTEES 1-21, 43-45, 69 (1973); K. SHEPSLE, THE GIANT JIGSAW PUZZLE (1978); see generally Eulau, *Committee Selection*, in HANDBOOK OF LEGISLATIVE RESEARCH 191, 208-15 (G. Loewenberg, S. Patterson & M. Jewell eds. 1985) [hereinafter HANDBOOK] (analyzing the empirical studies and models of committee selection). But see K. KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION ch. 4 (1991).

on the Agriculture Committee (urban members tend not to desire it), and a casual examination suggests that farm district members overwhelmingly dominate those committees in Congress.⁷¹ Even if the membership of committees better reflected membership in Congress, over time there would be a skewing of preference through the formation of triangular relationships among subcommittees, agencies and departments, and relevant interest groups.⁷²

Given interests and preferences that might diverge from those of their chambers, sponsors and committees have incentives to behave strategically. Strategic behavior might show up in committee reports and sponsors' floor statements, which makes even these accepted conventions potentially quite unreliable sources. For example, on the *Bock Laundry* issue it appears that the House and Senate Judiciary Committees were more liberal than their respective chambers (especially the Senate). Yet the committee members controlled the writing of the conference report and dominated discussion during floor consideration of the conference bill. Some of their statements are clearly self-serving,⁷³ and others may also have been. To the extent that committee reports and sponsors' statements are used by courts to elaborate on the statutory language, there is a danger that they systematically distort Congress' overall preferences, given the skewing effects of the established conventions.

3. Attenuated Intentionalism—Imaginative Reconstruction

The political theory critique that both strong and weak intentionalism rest upon questionable assumptions about the legislative process has gained force over time. This difficulty has impelled the most thoughtful proponents of legislative history as evidence of specific intent to develop an even more generalized version of that theory, namely, "imaginative reconstruction." As articulated by Professor (later Dean) Roscoe Pound, the judge tries to discover "what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in

71. See M. BARONE & G. UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1411, 1423 (1990), for a listing.

72. See generally R. RIPLEY & G. FRANKLIN, *CONGRESS, THE BUREAUCRACY AND PUBLIC POLICY* (4th ed. 1987); Hamm, *Legislative Committees, Executive Agencies, and Interest Groups*, in *HANDBOOK OF LEGISLATIVE RESEARCH*, *supra* note 70, at 573.

73. *E.g.*, 120 CONG. REC. 40,891 (1974) (Rep. Hungate's statement that the "conference rule strikes a middle ground between the two versions, but a ground as close or closer to the House version than to the Senate's").

controversy.”⁷⁴ Judge Learned Hand was the classic practitioner of this approach,⁷⁵ and Judge Richard Posner has recently revived interest in imaginative reconstruction as a general theory of statutory interpretation.⁷⁶

Imaginative reconstruction best captures the Supreme Court's use of legislative history in *Bock Laundry*.⁷⁷ The Court told a highly contextualized story about Rule 609(a)(1), and a point that emerged from the story was that there was no legislative agreement to expand much upon the common-law rule, which generally admitted criminal convictions for impeachment.⁷⁸ Given Congress' disinclination to change the common law drastically, the Court was reluctant to expand upon Rule 609(a)(1)'s limitation of its benefit to defendants and, therefore, narrowed the benefit to criminal defendants instead of expanding it to all parties.

Imaginative reconstruction is the most successful theory of legislative history as evidence of specific intent. It generally avoids the constitutional critique by refusing to treat any specific tidbit from the legislative record as completely authoritative in the same way that statutory language is. It avoids at least part of the political theory critique by refusing to claim that its reconstruction is anything more than a well-informed probabilistic judgment about how the average legislative observer would have thought the statute resolved an issue when the statute was enacted. Hence, imaginative reconstruction does not have to engage in vote-counting and aggregation efforts, nor does it have to defend the validity of legislative history conventions. The interpreter acts like a good historian, examining the evidence and reaching the best conclusion she can, discarding conventions that appear unrealistic in the general, or unreliable in the specific case.

Notwithstanding its sensibleness, imaginative reconstruction suffers

74. Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

75. See, e.g., *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 788-91 (2d Cir. 1946), *aff'd*, 328 U.S. 275 (1946); *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914); L. HAND, *How Far Is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 103, 105-10 (3d ed. 1960).

76. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-87 (1985) [hereinafter *FEDERAL COURTS*] (“the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him”).

77. Justice Stevens, the author of the opinion, quite self-consciously follows the imaginative reconstruction technique in his statutory opinions generally. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (Stevens, J.).

78. Evidence in support of this point included: the Advisory Committee's own flip-flopping on the issue; the controversy engendered in the House and the Senate; the confining language of the final bill and the conference report; the explicit statements of Representative Dennis, a conferee who modified his earlier expansive view in light of the conference “compromise”; and the presumption against legislative alteration of common-law rules.

from an important difficulty. In its effort to avoid the constitutional and political theory critiques which beset other theories, imaginative reconstruction compromises the critical assumptions of those other specific intent theories by elevating the judicial interpreter well above the supposed role of the honest agent faithfully implementing the intended commands of the supreme legislature. This illustrates a central dilemma for any theory of legislative history as evidence of specific intent. The most attractive version in a representative democracy (strong intentionalism) is subject to crippling objections that it makes politically unrealistic assumptions and leaps of logic. To meet these objections, weaker theories have been put forward, but these theories have gradually sacrificed the essence of legislative history's authority value—the intuitive appeal of an interpretation that was specifically intended by our elected representatives. The more attenuated the claim made by the theory, the less authoritative becomes the use of legislative history, and the greater the role of judicial discretion becomes. Under the theory of imaginative reconstruction, the role of the judge threatens to overwhelm the role of legislative history.

Thus, any assumption that judges will be able faithfully to recreate the historical understanding of a previous legislature is subject to some doubt. Gaps in the historical record, the judge's imperfect ability to understand the record, and the distance created by time are all factors that impede even the most imaginative reconstruction. A central lesson of Legal Realism, explored more thoroughly below, is that judicial discretion is not easily cabined, and the judge's own context and values will decisively influence how she reconstructs the past.

Indeed, it is precisely this imposition of judicial values that occurred in *Bock Laundry*. Elaborating on the final version of Rule 609(a)(1), the conference report (obviously the critical document for any kind of imaginative reconstruction) spoke generally of protecting defendants in criminal cases. But the Court candidly admitted that this evidence was hardly conclusive. Why did the report not concede that the conference committee was refusing to protect civil litigants? Its failure even to mention them can be read as evidence either that Congress probably meant for the balancing test only to protect criminal defendants, or that Congress was just not thinking very specifically, *or* that the conference committee could not agree on a rule for civil cases and so left the issue to be resolved in the courts.⁷⁹ I think the second explanation is the most historically plausible, if you carefully follow the flow of the actual legislative de-

79. See *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521-22.

bates⁸⁰ and if you recall the position of each chamber coming into conference.⁸¹ Nonetheless, the Court *chose* the first explanation, apparently because “[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.”⁸² Thus, a judicial clear statement rule—and not the legislative history—was ultimately critical to the Court’s “reconstruction” of the probable “intent” of Congress.

Bock Laundry interpreted a recently enacted statute, and the interpretive issue was the subject of substantial deliberation. Consider how much more difficult, indeterminate, and subject to judicial interpolation it would be for a court to interpret an older statute for an issue not specifically discussed.⁸³ The Supreme Court’s efforts to reconstruct the intent of the Congresses enacting the Civil Rights Acts of 1866, 1871, and even 1964 can be easily shown to be indeterminate, because the ultimate interpretive answer is driven more by current statutory context and the Court’s own values than by the values of the enacting Congress.⁸⁴ In these cases and others, the Court’s interpretations are more imaginative than they are reconstructions.

C. *The Jurisprudential Critique*

Underlying many of the arguments in the 1930s and 1940s against legislative history as evidence of specific intent was a jurisprudential questioning of the theory’s assumptions (positivism, legislative sover-

80. The debate in the House considered effects of impeachment by felony convictions in both criminal and civil settings. But the Representatives were clearly most interested in the criminal setting, and one simply suggested that the civil application be dealt with separately. 120 CONG. REC. 2379 (1974) (Rep. Wiggins). The Senate report focused mainly, but not exclusively, on impeachment of “the accused” in criminal cases, SENATE REPORT, *supra* note 60, at 14-15, and virtually all of the Senate debate focused on criminal cases. 120 CONG. REC. 3075-83 (1974). The conference report completely ignores civil cases. The most likely inference I drew from this evidence is that the conferees focused only on criminal cases and forgot to deal explicitly with civil cases. The Court’s inference that Congress intended to carry forth the common-law rule of unrestricted impeachment finds very little support in the dynamics of the legislative debates.

81. The House bill permitted impeachment in all cases (civil and criminal) only if there were a *crimen falsi*, and the Senate bill as amended permitted impeachment in all cases (civil and criminal) if the witness had been convicted of a serious felony or a *crimen falsi*. Thus neither chamber coming into conference distinguished between civil and criminal cases in fashioning an impeachment rule for prior felony convictions. The conference committee probably had the authority to create such a bifurcated rule, but there is no positive evidence that it so intended.

82. *Bock Laundry*, 490 U.S. at 521.

83. Judge Posner recognizes this problem and in his recent work has adopted a more eclectic approach. See R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 220-85 (1990); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Posner, *The Decline of Law as an Autonomous Discipline*, 1962-87, 100 HARV. L. REV. 761 (1987).

84. See Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1484-94, 1538-40 (1987).

eignty, and subjectivism). Turn-of-the-century Holmesian objectivism questioned the desirability of tying law to subjective legislative intentions. The Legal Realists of the 1920s deconstructed the asserted link between legislative expectations and judicial interpretation, and thereby suggested the inherent inconsistency between legislative supremacy and statutory interpretation by an independent judiciary. Legal rationalists of the late 1930s and 1940s recoiled against the stark positivism shared by Mechanical Jurisprudence and Legal Realism and urged a closer relationship between law and reason.

The effect of these jurisprudential developments was not only to undermine the intellectual foundations of the classic theory of legislative history as evidence of specific intent, but also to prepare the way for fresh theorizing about the value of legislative history.

1. Holmesian Objectivism

Justice Holmes resisted the emerging subjectivist theories of law and sought to place law on a more objective footing. Just as he favored a "reasonable person" standard for tort liability, so he favored a "normal speaker" standard for statutory interpretation, so as to preserve the integrity, the "externality of the law."⁸⁵ Holmes thus accepted the positivism and legislative sovereignty assumptions undergirding legislative history as evidence of specific intent, but resisted the subjectivism assumption. For Holmes, positive law loses much of its moral force unless its commands can be determined objectively. Holmes' interest in the externality of law has been a primary linchpin in subsequent attacks on legislative history as evidence of specific intent,⁸⁶ but as I have suggested above, law's objectivity can be usefully served by reference to legislative history. And Holmes, who was nothing if not practical and eclectic, sometimes relied on legislative history to figure out what the external law required.⁸⁷ In short, Holmes' rejection of subjectivist concepts of law

85. Holmes, *supra* note 24, at 417-18: "[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . . [T]he normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law."

86. The Realist Radin and New Textualists Easterbrook and Scalia all pay homage to Holmesian objectivism, for example.

87. His opinion for the Court in *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41 (1928), for example, relied on legislative history to interpret a statute the dissenting Justices found clear on its face. "It is said that when the meaning of language is plain we are not to resort to [extrinsic] evidence in order to raise doubts. That is rather an axiom of experience than a rule of law," Holmes responded, "and does not preclude consideration of persuasive evidence if it exists." *Id.* at 48.

was only a jurisprudential start in the critique of legislative history as evidence of specific intent.

2. Realist Vision of Judicial Power

The Legal Realists agreed with Holmes' attack on subjectivism, but added their own vigorous indictment of the legislative sovereignty assumption and its corollary, that judges interpreting statutes are simple agents of the legislature with little or no lawmaking discretion. Thus, Radin argued that the only job of Congress is to write words that are put into the statute books. Once the statutes have been written its job is over, and its expectations are irrelevant to statutory interpretation.⁸⁸

"Just as the application of legislation does not usually depend on the discovery of the meaning of words, so does it [not] depend on discovery of the 'intention' or the 'will' of the legislature, or of the legislator," argued Radin in 1946. "The basis for this is once more the theory of the sovereign legislator who . . . is the political superior of the administrator or judge. Since our legislature is no more and no less sovereign than administrators or judges, and since all constitutional officials have a prescribed function, the theory falls with the basis upon which it is erected."⁸⁹

Radin's point was that the legislature in our constitutional system is not sovereign. "We the People" are sovereign and have delegated governmental tasks to three branches of government, one of which is the legislature. Hence, judges are not mere agents of the legislature, but are instead on an equal plane. Both the legislature and the courts owe allegiance to the overall operation of our government.⁹⁰ The Realists further asserted that judging is a creative process,⁹¹ and most prominent Realists

88. Radin, *supra* note 26, at 871.

89. Radin, *supra* note 68, at 406. "If we persist in saying that the main and fundamental purpose is to carry out the will of a specific person, when we know that we are dealing with a person who can have no will, as we understand it, and who has no more right to impose his unexpressed will on the administrators and judges than the latter may impose their will as such on the legislature—if we persist in saying this, we shall continue to be driven by a disingenuousness that irks a great many lawyers and should be extremely unpleasant to all of them." *Id.* at 407.

90. Radin's point seems quite apparent today. The unitary positivism of Mechanical Jurisprudence was undergirded in large part by Austin's positivism, which in turn owed much to the unitariness of sovereignty through most of English history (the Crown was sovereign through the Middle Ages, then the early modern period saw Parliament struggle to become the embodiment of sovereign government). Our constitutional traditions are very different, and the Constitution itself contemplates three co-equal branches of government. The idea of equal branches united in their pursuit of the common good has been revived in the last decade as part of the "republican revival." See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

91. The classic statement is Judge Cardozo's confession that the nature of the judicial process is

vigorously asserted that statutory interpretation involved substantial judicial lawmaking.⁹² Even if legislative intent were relevant, it could never practically confine judicial discretion. "[A]fter all, it is only words that the legislature utters; it is for the courts to say what those words mean." Many early twentieth century thinkers argued that "all the Law is judge-made law" and that "courts put life into the dead words of the statute."⁹³

Although the Realists may have gone too far in emphasizing the inevitability of judicial lawmaking,⁹⁴ their general insight that interpretation involves a creative interaction of text, context, and interpreter is widely accepted today.⁹⁵ To the extent that the Realists were successful in debunking the legislative sovereignty assumption, they established a dilemma for themselves as well as for more traditional scholars. How can the objectivity of positive law (the Holmes position, accepted by the Realists) be maintained in the face of substantial and unfettered judicial lawmaking (the result of Realist emphasis on judicial creativity)? In my view, the Realists never quite escaped this paradox, but the next generation of legal scholars thought they had found a way out.

3. The Rationalist Revival

A final contribution of the Realists was their belief that law is policy, to be followed because it furthers the collective goals of our society. "A statute is better described as an instruction to administrators and courts to accomplish a definite result, usually the securing or maintaining of recognized social, political, or economic values." Hence, Radin asserted, "we may call the statute a ground design," a general policy plan

"uncertainty" and not objective answers, and that "the process in its highest reaches is not discovery, but creation" B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

92. See, e.g., M. COHEN, *LAW AND THE SOCIAL ORDER* 131 (1933); C. CURTIS, *IT'S YOUR LAW* 65 (1954); K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 382 (1960); Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 *IND. L.J.* 414 (1961); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 *COLUM. L. REV.* 1259, 1267, 1269-70 (1947).

93. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 124-25 (2d ed. 1921). "Whoever hath an absolute authority to interpret any . . . laws, it is *he* who is truly the Law-giver . . . and not the person who first wrote . . . them." *Id.* at 172 (emphasis in original) (quoting Bishop Hoadly). Note that John Chipman was not a Legal Realist, but this book contains many ideas with which the Realists agreed.

94. See R. DICKERSON, *supra* note 52, at 13-21, 67-86, for the best synthesis of more traditional scholars' responses to the Legal Realists.

95. See generally R. DICKERSON, *supra* note 52, at 14 & n.5, 18 & n.21 (leading source critical of the super-Realist perspective, but still conceding this point). The new "jurisprudence of interpretation" in the 1980s suggests this point even more strongly than the Realists did. See generally *Interpretation Symposium*, 58 *S. CAL. L. REV.* 1 (1985); *Law and Literature: Symposium*, 60 *TEX. L. REV.* 373 (1982).

whose details would be filled in by courts over time.⁹⁶ In the late 1930s and 1940s, some thinkers—notably Professor Lon Fuller—went beyond the Realists' emphasis on policy to urge a renewed interest in natural law, the concept that law is accountable to reason and is not just the commands of the sovereign.⁹⁷ The interest in natural law was stimulated in part by the belief of most American intellectuals that our law was more legitimate than the law promulgated by fascist governments in Europe.⁹⁸

Fuller argued in 1940 that law cannot be mere commands and predictions, because we cannot even restate or predict the law without being influenced by our conceptions of the good. Just as the teller of an amusing anecdote will unconsciously alter (improve) the anecdote upon retelling it, so the interpreter of a statute will reinterpret it in light of the statute's perceived goals in an effort to make the statute live up to its best purpose.⁹⁹ In combination with the Realists' view of judging as a creative process, Fuller's insight was quite powerful. Law, according to Fuller, is not and should not be static. Any effort to tie legal meaning to its origins betrays the legal process.¹⁰⁰ This insight rendered traditional theories of legislative history obsolete, and stimulated a second period of theorizing about the value that might be served by legislative history.

II. PURPOSE VALUE: LEGISLATIVE HISTORY AS EVIDENCE OF GENERAL INTENT

An urgent question for legal scholars in the 1930s was what effect the various criticisms of legislative history's authority value should have on the practice of statutory interpretation. The question was urgent, partly because the New Deal brought many of the critics into the government, often as judges. Interestingly, the critics and those influenced by

96. Radin, *supra* note 68, at 407.

97. See L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940).

98. See *id.* at 122-25 (arguing that the assumptions of positivism "played an important part . . . in bringing Germany and Spain to the disasters which engulfed those countries"). The jurisprudential shift note in this paragraph is thoroughly traced and analyzed in E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

99. "[A] statute or a decision . . . involves two things, a set of words, and an objective sought. This objective may or may not have been happily expressed in the words chosen by the legislator or judge. This objective, like the point of the anecdote, may be perceived dimly or clearly; it may be perceived more clearly by him who reads the statute than by him who drafted it. The statute or decision is not a segment of being, but, like the anecdote, a process of becoming. By being reinterpreted it becomes, by imperceptible degrees, something that it was not originally." L. FULLER, *supra* note 97, at 9-10.

100. "In a sense, then, the thing we call 'the story' is not something that is, but something that becomes; it is not a hard chunk of reality, but a fluid process, which is as much directed by men's creative impulses, by their conception of the story as it ought to be, as it is by the original event which unlocked those impulses." *Id.* at 9.

them rejected a return to the pure textualist approach of the nineteenth century treatises. Jurisprudentially, it was simply too well-established, for Realists and non-Realists alike, that meaning depends upon context and upon the decisionmaker for scholars in the 1930s to seriously consider a return to plain meaning as the basis for statutory interpretation. Influenced by the Realist emphasis on law as policy and a revived interest in law as evolving norms, scholars in the 1930s turned the critique of legislative history's *authority value* into a positive theory emphasizing the *purpose value* of legislative history, its usefulness as evidence of the legislature's policy purpose, or "general intent."

Historically, there was nothing new about using purpose as the objective of legislative research,¹⁰¹ for Holmes and others had endorsed this more generalized intent as the better inquiry for statutory interpretation early in the century.¹⁰² But the theory of legislative history as evidence of general intent emerged as a carefully worked out dominant theme of scholarship about legislation in the period from 1938 to 1949. The key scholars were Professors Max Radin,¹⁰³ Harry Wilmer Jones,¹⁰⁴ Frederick de Sloovere,¹⁰⁵ and Lon Fuller,¹⁰⁶ as well as Judge Jerome Frank¹⁰⁷ and Justice Felix Frankfurter.¹⁰⁸ In the 1950s, Professors Henry Hart

101. The classic is *Heydon's Case*, 76 Eng. Rep. 637, 3 Co 7a (Exch. 1584), which posited "for the sure and true interpretation of all statutes" that the interpreter should consider:

- (a) What was the common law before the making of the Act;
- (b) What was the mischief and defect for which the common law did not provide;
- (c) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and
- (d) The true reason of the remedy; [A]nd then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . .

Id. at 638.

102. See *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J.) ("the general purpose [of a statute] is a more important aid to the meaning than any rule which grammar or formal logic may lay down").

103. Radin, *supra* note 68.

104. Jones, *Extrinsic Aids*, *supra* note 3; Jones, *Plain Meaning Rule*, *supra* note 3; see also Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 969 (1940).

105. See de Sloovere, *supra* note 3, at 527.

106. See Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (wonderfully encapsulating the contemporary debate over theories of statutory interpretation); see also L. FULLER, *supra* note 97. I shall quote from Fuller's article elsewhere in this piece, and a word of context is important. The article is a debate among five judges over the interpretation of a criminal statute used to convict several speluncean explorers in the year 4300. The views of Foster, J., are the ones that I consider representative of the then-emerging Legal Process School, but those views are attacked by other judges in Fuller's article and, hence, are not unequivocally endorsed in that thought piece itself.

107. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

108. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

and Albert Sacks compiled their "legal process" materials, which synthesized the work of the earlier thinkers and set out in the classic form the theory of legislative history as evidence of general intent.¹⁰⁹ The Legal Process school carefully reworked the earlier assumptions of legislative history theory in light of jurisprudential and political developments (the New Deal).

Thus, the nascent Legal Process school posited a *modified positivism* assumption as an explanation of what law is. These scholars viewed law as a purposive command grounded in collective reason. "The powers of government can only be justified morally on the ground that these are powers that reasonable men would agree upon and accept if they were faced with the necessity of constructing anew some order to make their life in common possible,"¹¹⁰ Fuller suggested. Hart and Sacks' materials started out with a long introductory section laying out the role of law in modern society. Following Fuller, their central point was that "[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living."¹¹¹ These scholars applied this central idea to statutes, with a vengeance. As Frankfurter put it, "[l]egislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government"¹¹² Hart and Sacks declared that "[e]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."¹¹³

Similarly, in place of the legislative sovereignty assumption, the Legal Process theorists assumed a shared sovereignty, in which the three branches of government worked together to yield legal rules. Thus, "[t]he 'law' of a statute is not complete when the legislative stamp has been put upon it; subsequent judicial decisions add meaning and effect to the statutory direction," argued Jones. "The interpretation of a statute

109. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958); see Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693-700 (1987); Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983), for more detailed analysis of the Hart and Sacks materials.

110. Fuller, *supra* note 106, at 622; see *id.* at 621 ("Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common."); cf. *supra* note 106 (explaining unusual format of this article).

111. H. HART & A. SACKS, *supra* note 109; see Weisberg, *supra* note 109, at 217.

112. Frankfurter, *supra* note 108, at 538-39; see Radin, *supra* note 68, at 398 ("The statute, which is not a mandate of a supremely authoritative lawgiver who must be presumed to have used no word or syllable otherwise than deliberately and advisedly, was enacted to achieve a purpose.").

113. H. HART & A. SACKS, *supra* note 109, at 1156; see *id.* at 1414-15 (assume that "the legislature was made of reasonable persons pursuing reasonable purposes reasonably").

with respect to wholly unforeseen issues requires the exercise of origina-tive thinking on the part of those charged with its application to particu-lar controversies, whether these be judges or administrative officers."¹¹⁴ Hart and Sacks viewed law as a process of "reasoned elaboration," in which the legislature, through an informed and deliberative process, would enact statutes which would then be applied in a reasoned manner by courts and agencies.¹¹⁵ The role of each body would be dictated by its "institutional competence" to perform the purposive tasks of government.¹¹⁶

Finally, Legal Process rejected both the traditional assumption about the essentially mechanical role of the judge, and the Realists' assumption that judging is completely creative, in favor of a *policy-constraint assumption*. Its theorists believed courts should be constrained, but by policy rather than by will. In a democracy such as ours, the elected legislature makes the primary policy decisions (and hence is formally supreme), but judges carry out those decisions over time and hence develop the statutory purposes dynamically, but always constrained by the legislature's original policy choices. These assumptions generated Hart and Sacks' theory of statutory interpretation. Since "every statute . . . has some kind of purpose or objective," ambiguities can be intelligently resolved, first, by identifying that purpose and the policy or principle it embodies, and then by deducing the result most consonant with that principle or policy.¹¹⁷

Given these assumptions, legislative history takes on a somewhat different role than it did under the assumptions of earlier theory. Thus, Radin in 1942 backed away from his 1930 rejection of legislative history by reconceptualizing its role. "It is likely that the study of [a committee] report, when the general purpose—the ground design—is not sufficiently indicated [by statutory text], will greatly aid in making the purpose apparent, as well as in discovering what other values are to be kept intact so far as possible."¹¹⁸ The great advantage of legislative history was its abil-

114. Jones, *Extrinsic Aids*, *supra* note 3, at 761. "Another way of putting the matter is this: The legislature cannot itself enforce the statutes. It must delegate that task to other governmental agencies—to the executive and his subordinates, or to administrative bodies, or to the courts." Frank, *supra* note 107, at 1270.

115. H. HART & A. SACKS, *supra* note 109, at 164.

116. *Id.* at 3-4.

117. *Id.* at 166-67; *see id.* at 1148-79, 1200 (similar); *see also* Frankfurter, *supra* note 108, at 539 (judge must seek to effectuate statutory purpose, not any subjective intent of the legislature); Radin, *supra* note 68, at 399 ("the task of the court is first to determine the purpose of the statute and the extent that the discretion of the administrative officials or of the court is limited either procedurally or substantively by the means which the statute indicates for achieving its purpose").

118. Radin, *supra* note 68, at 411. "But" he immediately added, "there is no legislative force in the report." *Id.*

ity to give effect to the supremacy of the legislature by minimizing the role of the judge's personal preferences.¹¹⁹

Again, the classic statement of the use of legislative history as evidence of general intent was made by Hart and Sacks.¹²⁰ They started with the working assumption that "unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."¹²¹ From that assumption, the judicial interpreter should infer the purpose that such reasonable legislators probably had in mind based upon the mischief that their law addressed. "The internal legislative history of the measure . . . may be examined," the materials declared, but only "for the light it throws on *general purpose*. Evidence of specific intention with respect to particular applications is competent only to the extent that the particular applications illuminate the general purpose and are consistent with other applications of it."¹²²

Justice Blackmun's dissenting opinion in *Bock Laundry* is a conscious invocation of the purpose value of legislative history, that is, its use as evidence of general legislative intent. Recall that the majority opinion by Justice Stevens invoked legislative history for its authority value, implicitly making the assumptions underlying that theory. Justice Scalia's concurring opinion scorned the majority's use of legislative history, explicitly rejecting the subjectivism assumption in favor of a text-objectivism one. All of the Justices in the majority treat Rule 609(a)(1) as a simple command, to be obeyed however unreasonable (unless contrary to the higher command in the Constitution). Justice Blackmun treats Rule 609(a)(1) as an expression of policy, to be interpreted in specific cases to carry out the purposes of the statute.

Like Justice Scalia, Justice Blackmun found the majority's detailed reconstruction of the legislative history unhelpful, except to confirm that

119. "In a word, the more comprehensive and detailed the contextual setting becomes—through minute study of the internal history of the bill and other extrinsic aids—the less subjective becomes the interpretive process." de Sloovere, *supra* note 3, at 540.

120. H. HART & A. SACKS, *supra* note 109, at 1179-1302, develop their theory of statutory interpretation by a careful and detailed analysis of Supreme Court cases. Hart and Sacks are quite critical of decisions such as *Caminetti*, which ignore legislative history, and generally endorse decisions which consider legislative history as evidence of the legislature's general purposes and policies. *E.g.*, *Johnson v. Southern Pac. Co.*, 196 U.S. 1 (1904) (reproduced and discussed *id.* at 1180-86, 1200; lower court opinion reproduced and criticized, *id.* at 1165-74).

121. H. HART & A. SACKS, *supra* note 109, at 1415.

122. *Id.* at 1415-16. Hart and Sacks suggest another caveat, that "[e]ffect should not be given to evidence from the internal legislative history if the result would be to contradict a purpose otherwise indicated and to yield an interpretation disadvantageous to private persons who had no reasonable means of access to the history." *Id.* at 1416.

the curious statutory language was not the result of careful drafting.¹²³ Like the majority, Justice Blackmun found the conference committee report to be the key document. But Justice Blackmun read the report differently. While the majority emphasized the admittedly confused references in the report to the effect of Rule 609(a)(1) on criminal defendants,¹²⁴ the dissent relied on "the underlying reasoning of the Report, rather than on its unfortunate choice of words, in ascertaining the Rule's proper scope."¹²⁵ The purpose for excluding evidence in criminal cases is to head off "the danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record,"¹²⁶ and that purpose is equally applicable to civil cases, argued Justice Blackmun. Additionally, the overall purpose of the Federal Rules of Evidence, "to secure fairness" and to ascertain "the truth" in federal civil and criminal proceedings, is better served by re-writing Rule 609(a)(1) to afford the balancing test for all parties and not just for criminal defendants.¹²⁷

By construing Rule 609(a)(1) "so as to avoid 'unnecessary hardship' and to produce a sensible result,"¹²⁸ Justice Blackmun's dissenting opinion reflected the teachings of Legal Process theory and might seem to be a more satisfactory approach to legislative history in general. However, the Legal Process approach of using legislative history as evidence of general intent has itself been subject to substantial criticism. As previously, I divide the critiques into political theory, constitutional, and jurisprudential critiques.

A. *The Political Theory Critique*

Some of the early Legal Process thinkers believed that the use of legislative history as evidence of general intent substantially avoided the political theory critique of legislative history. "Legislative intention, in the sense of the purpose or policy embodied in a statute, is more often

123. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989) (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting) (almost all the majority's history entitled to "very little weight" because Rule 609(a)(1) changed so often).

124. "The danger of prejudice to a witness other than the defendant . . . was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible." H.R. CONF. REP. NO. 93-1597, 93d Cong., 2d Sess. 9 (1974) [hereinafter CONFERENCE REPORT], quoted in *id.* at 520.

125. *Bock Laundry*, 490 U.S. at 531 (Blackmun, J., dissenting).

126. *Id.* at 532 (quoting CONFERENCE REPORT, *supra* note 124, at 10).

127. *Id.* at 532-33 (quoting FED. R. EVID. 102).

128. *Id.* at 535 (quoting *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933)).

discoverable than is an understanding of legislators as to technical meaning or specific application.”¹²⁹ Such a claim is implicit in the Hart and Sacks materials as well as in applications of their approach in cases such as *Bock Laundry*.

It is not entirely clear, however, that the use of legislative history as evidence of general, as opposed to specific, intent really does avoid the political theory critique. An important problem with the theory rests with its belief that statutes embody coherent purposive policies or, as Hart and Sacks put it, that “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”¹³⁰ In *Bock Laundry*, for example, Justice Blackmun assumed that the Federal Rules of Evidence embody general policies of fairness and justice (whatever that means), but gives us no reason to think that any members of Congress, let alone most of them, had these policies in mind when they passed the statute, or that they voted for the statute with that purpose, or any other “reasonable purpose,” in mind. The actual legislative debates on Rule 609(a)(1) speak just as much to the need to reach a compromise on this thorny rule (so that the entire statute could be passed), as they do to the policy embodied in the statute.

Judge Posner has questioned the policy value of legislative history on precisely these grounds. According to his political theory critique, reasonable legislators do not have the same public purposes that are likely to be attributed to statutes by reasonable judges, especially when the statute is a compromise between conflicting groups.¹³¹ “[W]here the lines of compromise are discernible, the judge’s duty is to follow them, to implement not the purposes of one group of legislators but the compromise itself.”¹³² In brief, a reasonable legislator often has no policy or purpose in mind at all when she votes for a bill beyond her own political interests. Even when she does have a purpose in mind, it is not one that she is willing to pursue at all costs, and it is usually limited by other purposes she has in mind or is willing to accept as part of a compromise.

Judge Posner does not claim that his critique is applicable to all uses of legislative history as evidence of general intent, for sometimes such

129. Jones, *Extrinsic Aids*, *supra* note 3, at 761. “A great number of the members of a legislative body are likely to be aware of, and to put themselves on record as to, the purposes underlying a legislative proposal; for argument in Congress . . . more often reflects disagreement as to the wisdom of general policies rather than differences of opinion with respect to technical points of construction.” *Id.*; see de Sloovere, *supra* note 3, at 538-39 (“Not to concede the existence of at least a discoverable purpose in legislative history would be to deny any relation between what legislators do in enacting legislation as a body and what they express in the language of statutes.”).

130. H. HART & A. SACKS, *supra* note 109, at 1415.

131. R. POSNER, *supra* note 76, at 288-90.

132. *Id.* at 289.

history does reveal a consensus in favor of a specified statutory policy.¹³³ But the critique may be applicable to *Bock Laundry*. From the perspective of political theory, it is questionable for Justice Blackmun to talk about the overall purpose of the Federal Rules of Evidence, because it had little to do with the deal-cutting needed to craft a Rule 609(a)(1) acceptable to both the House and Senate. It is scarcely more meaningful to rely on the purpose Justice Blackmun attributes to Rule 609(a)(1), to prevent juries from deciding a case based upon their disapproval of a person's prior conviction. The Senate didn't believe in that purpose at all, for such a proposal made by its Judiciary Committee was rejected on the floor. The House, which did believe in that purpose, was willing to sacrifice it so that the bill could be enacted. Thus, all the talk about statutory purposes just begs the only relevant question: what *was* the deal cut in the conference committee?

The foregoing political theory critique challenges the Legal Process tradition to offer a political theory that justifies its "reasonable legislator" assumption. Because neither Hart and Sacks nor their intellectual precursors explicitly discussed political theory very much, it is not completely clear how they would respond. I can glean from Hart and Sacks, and their intellectual heirs, three types of political theories upon which they might plausibly rest their claims of reasonableness and purposivism. I consider two of the possible theories hard to defend. The third (and most plausible) theory is subject to constitutional problems to be explored in the next section.

1. Optimistic Pluralism

The early Legal Process scholars wrote their articles during the New Deal era, when the legislative process was widely regarded as public-seeking.¹³⁴ In that period, and even more prominently after post-World War II, it was recognized that interest groups played a significant role in the legislative process, but that did little to disturb the consensus about the public-seeking legislature. "Optimistic pluralism" posited that on any important public issue a variety of interest groups, representing a variety of perspectives, would form. After considering all the different perspectives, the legislature would then produce a rational, purposive

133. Even such a critic of legislative history as Justice Scalia uses it for this purpose, as his *Bock Laundry* concurring opinion suggests. See also *United States v. Owens*, 484 U.S. 554, 562 (1988) (Scalia, J.); *United States v. Fausto*, 484 U.S. 439, 445-46 (1988) (Scalia, J.).

134. Pigovian economic theory, a leading theory of politics, posited that government existed to produce public goods (those that would unlikely be yielded in the private marketplace).

statute solving the problem at hand.¹³⁵ Hart and Sacks cited the leading optimistic pluralist books of the 1950s,¹³⁶ and it might be argued that this theory of politics offers some support for their reasonable legislators assumption.

This theory of politics, however, has been substantially discredited over the last thirty years. To begin with, political science studies of legislator motivation suggest that rational legislators are not wholly concerned about the policies and public purposes of the legislation they enact. The leading study suggests at least three goals for legislators: reelection; prestige within the legislature; and (least important for most) a desire to contribute to public policy.¹³⁷ Public choice theory assumes that reelection is the primary goal of legislators.¹³⁸ Legislators achieve this goal, not by bold policy entrepreneurship, but by doing constituent service and pork barrel projects, avoiding controversial stands, and favoring compromises whenever necessary to defuse controversial issues.¹³⁹ A substantial literature explores other "purposes" a rational legislator often pursues, including loyalty to and influence within her political party.

Notwithstanding this evidence, it may be too cynical to suggest that legislators are relatively unconcerned with the policies embodied in statutes they pass. But it is surely blinking reality to believe that legislators necessarily believe wholeheartedly in any statutory policy or purpose. Because of the many roadblocks any statute must surmount before enactment (if it gets that far), the supporters of the statute must trade off some of their policy preferences at some point to head off opposition or woo undecided legislators. The resulting statute "tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent What may be called public policy is the equilibrium reached [in the political] struggle at any given moment."¹⁴⁰

135. See T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); Eskridge & Frickey, *supra* note 109, at 697.

136. See H. HART & A. SACKS, *supra* note 109, at 727 (citing W. BINLEY & M. MOOS, *A GRAMMAR OF AMERICAN POLITICS* (1950); *id.* at 739 (citing D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951)); *id.* at 747 (citing V.O. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* (4th ed. 1958)).

137. R. FENNO, *supra* note 70.

138. See M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

139. See M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981).

140. E. LATHAM, *THE GROUP BASIS OF POLITICS* 35-36 (1952); see E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 37-38 (1960).

Finally, studies of the legislative process in the last thirty years make one less likely to think that when legislators are acting purposively and do not compromise their policies, those policies are public-seeking. It is now recognized by a variety of scholars not only that interest groups dominate the legislative process much of the time, but also that such groups do not form in such a way that a variety of viewpoints necessarily surround salient public issues.¹⁴¹ Often, those relatively unrepresented in interest group politics are the general population, such as consumers, who are hard to organize effectively. Classic "special interests," such as automakers and steel cartels, organize more easily and are, if anything, overrepresented in the political process. Hence, the purposes and policies favored (and typically compromised) by legislators are often private, rent-seeking purposes and policies, and not public-seeking ones.

To be sure, some recent studies of the legislative process emphasize the "public-regarding" motivations of legislators and the public spirit that permeates the process,¹⁴² but these studies are, frankly, more wishful (or, as one of them admits in its title, "hopeful") than descriptive. And the best of these studies emphasizing public-regarding conduct also emphasizes the virtually random and unpredictable nature of the legislative process, and characterizes lawmaking as "garbage-can decisionmaking."¹⁴³ It is doubtful that a sophisticated description of the legislative process readily supports the assumptions underlying legislative history's policy value.

2. Proceduralism

Most characteristic of Hart and Sacks was their faith that good procedures would ensure policy rationality in the legislature. Unlike many of their predecessors, Hart and Sacks were very interested in the legislative process itself and demanded that it be an "informed" and "deliberative" process.¹⁴⁴ Their further suggestion that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment" epitomizes the Legal Process philosophy.¹⁴⁵

("Congress has no mind or force of its own," because its statutes are at best temporary compromises).

141. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); J.Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

142. E.g., S. KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987); A. MAASS, *CONGRESS AND THE COMMON GOOD* (1984).

143. J. KINGDON, *AGENDA, ALTERNATIVES, AND PUBLIC POLICIES* (1984).

144. H. HART & A. SACKS, *supra* note 109, at 166-67.

145. *Id.* at 715. They pose the rhetorical question (which suggests its own answer, I believe): "To what extent should the legislative process be a rational process, whereby policy and factual

Proceduralism provides an illuminating context for the details of Hart and Sacks' theory of legislative history.¹⁴⁶ Hart and Sacks posited three requirements for using legislative history in statutory interpretation. First was *relevance*: only those "aspects of the internal legislative history which were officially before the legislature at the time of its enactment are part of its context."¹⁴⁷ Second was *competence*: relevant legislative history is also competent, unless the legislative materials were inaccessible to persons subject to the statute.¹⁴⁸ Third was *probative value*: "the internal legislative history of a statute should always be . . . used not as a separate and self-sufficient record of purpose and meaning but in the light of other relevant materials, and with the object only of resolving doubts emerging from the analysis of the problem as a whole."¹⁴⁹ In short, Hart and Sacks excluded legislative history that was not part of the public process of reasoned deliberation.

Such an approach is sophisticated and useful, and the proceduralist assumptions have great appeal to lawyers. But the theory runs up against the "paradox of proceduralism": if legislators are not purposivist to start with, and selfish interest groups form asymmetrically and do much to propel or thwart legislation, deliberative procedures may have perverse effects—thwarting public-regarding legislation but offering little or no resistance to rent-seeking legislation.¹⁵⁰ The reason for this paradox is that deliberative procedures create potential bottlenecks in the legislative process, which are most threatening to public interest bills that either have little interest group support (useful in surmounting roadblocks) or have some interest group opposition (which can kill or weaken a bill at any of the myriad roadblocks in the legislative process). Conversely, the plethora of procedures will be only a slight impediment to bills supported by interest groups and their allies when the costs of such legislation are not clear to the general population (hence, little or no organized opposition). The paradox of proceduralism is hardly an iron

information become the basis of carefully reasoned solutions; and to what extent ought the process rather to reflect the relative strengths of the pressures of competing interest groups?" *Id.* at 716.

146. This is taken from *id.* at 1284-86, a "tentative restatement" submitted by Henry Hart for discussion at the AALS in 1953. (With typical coyness Hart and Sacks merely identify the author as "one of the editors." The same excerpt in F. NEWMAN & S. SURREY, *LEGISLATION—CASES AND MATERIALS* 669-71 (1955), is identified as the work of Hart).

147. H. HART & A. SACKS, *supra* note 109, at 1284 ("tentative restatement," section 1(a)). Conversely, "[a]spects of the internal legislative history of a statute which were not officially before the legislature at the time of its enactment, such as the uncommunicated views of individual members about its meaning, are not directly relevant in determining the meaning which ought to be attributed to it." *Id.* ("tentative restatement," section 1(b)).

148. *Id.* at 1284-85 ("tentative restatement," section 2).

149. *Id.* at 1285 ("tentative restatement," section 3(a)).

150. Eskridge, *supra* note 53, at 289-94.

rule. Public-regarding bills supported by the President or a major political party can surmount many hurdles, and private-regarding bills sometimes can be headed off by publicity about their ill effects. However, it does make us doubtful about the usefulness of deliberation when the process is structurally biased.

Furthermore, realistic analysis of the legislative process suggests that statements about public purposes and general intent made in committee reports and floor debate—the very statements that Legal Process thinkers claim to have greater reliability than statements targeting specific issues—are often in fact less reliable. They are often just “sales talk,” put in the legislative history as a respectable explanation for the deals that were actually made, and which may not be discernible. Just as common-law courts will not hold sales personnel to puffery and statements of general opinion (“this used car will solve your transportation needs”) but will hold them to specific statements of fact (“we put all new radials on the car yesterday”), so statutory interpreters might be reluctant to hold Congress to the public relations purposes touted in its statutes, while giving due credit to the specific representations and directives set forth in the statutory text.

3. Attribution of Purpose

The Legal Process theory of legislative history as evidence of general intent is vulnerable to the argument that it does not adequately account for what actually goes on in the legislature. The theory becomes more defensible if it is viewed as resting upon a normative theory of our political system as a whole, and not upon a descriptive theory of the legislature. Upon this view, it is significant that Hart and Sacks never say that legislatures are in fact usually rational and public-seeking, and all the statutory interpreter does is to carry forth the actual purposes and policies that animated the legislators passing the bill into law. Instead, they do say that “[t]he first task in the interpretation of any statute (or of any provision of a statute) is to determine what purpose ought to be attributed to it.”¹⁵¹ In attributing purpose(s) to the statute, the court “*should not do this in the mood of a cynical political observer, taking account of . . . short-run currents of political expedience that swirl around any legislative session.*” It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reason-

151. H. HART & A. SACKS, *supra* note 109, at 1157 (emphasis in original). Those “criteria for the attribution of purpose” are laid out in *id.* at 1413-17.

able purposes reasonably.”¹⁵² At several points Hart and Sacks explicitly argue that attribution of purpose should at least sometimes consider the entire rational structure and harmony of the law.¹⁵³

Perhaps the best reading of Hart and Sacks is that even if they personally believed in optimistic pluralism or proceduralism, they did not ground their theory of statutory interpretation upon such beliefs about the legislative process. To the contrary, they grounded their theory on the role *courts* ought to play in our polity, namely, the reasoned elaboration of statutes, at times making the legislative product more rational than the legislature itself could have intended. This reading of Hart and Sacks on the whole avoids the political theory critique but, of course, raises substantial constitutional questions.

B. *The Constitutional Critique*

Like the Legal Realists, Hart and Sacks readily admitted that statutory interpretation involves judicial creativity, “lawmaking” activity, though they cautioned that courts are only “interstitial” lawmakers. Virtually no one in the post-World War II era is willing to argue that courts cannot engage in *any* creative lawmaking when interpreting statutes.¹⁵⁴ The problem is that Hart and Sacks contemplated substantial judicial lawmaking. Their theory of legislative history as evidence of general intent contemplates that the best interpretation of a statute will often be quite different from that originally expected by legislators enacting the statute.¹⁵⁵ That difference will often be driven by judicial elaboration of the statute’s meaning, through statutory precedents, clear statement rules, and canons of statutory construction. The judicial creativity envisioned by Hart and Sacks has been subjected to constitutional critique by subsequent Legal Process scholars and, most recently, by scholars influ-

152. *Id.* at 1414-15 (emphasis added). This was a uniquely Hart and Sacks locution, as they say also in *id.* at 1157: “The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear.”

153. “Doubts about the purpose of particular statutes must be resolved, if possible, so as to harmonize them with more general principles and policies” of law. *Id.* at 167; *see id.* at 1416 (similar); *see also id.* at 1412 (clear statement rules “may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally”). “Can the body of statutory law ever attain any semblance of rationality and consistency unless the courts continue unremittingly the effort to discern and articulate principles such as these?” *Id.* at 1241.

154. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985), sort of makes an argument to this effect, though he admits exceptions, *id.* at 38, 40-41, and it is not clear to me what his position actually is on the issue of judicial lawmaking.

155. *See* H. HART & A. SACKS, *supra* note 109, at 1203-17 (“new application of old enactments”); *id.* at 1412 (policies of clear statement “may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally”); *id.* at 1415-17 (general purpose can trump specific intentions, and may create statutory ambiguity).

enced by the Law and Economics movement. The critique argues that use of legislative history as evidence of general intent is inconsistent with the structure of our representative democracy. This critique relies on at least three different arguments, none of which I find completely successful.

1. Legislative Supremacy

Many of the Legal Process scholars after Hart and Sacks have been notably reluctant to follow their apparent suggestions that statutes should be interpreted creatively and dynamically. The central objection is that the policy value of legislative history threatens to violate legislative supremacy, a central norm of our representative democracy.¹⁵⁶ This objection was noted by early Legal Process scholars such as Fuller,¹⁵⁷ and has been a central concern of post-Hart and Sacks Legal Process scholars, most notably Professor Reed Dickerson.¹⁵⁸ It has also been a central concern of Law and Economics scholars, such as Judges Posner and Easterbrook.

According to the legislative supremacy principle, "although it does not enjoy an exclusive power to make substantive laws, the legislative branch exercises lawmaking that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches."¹⁵⁹ A corollary is that in statutory interpretation, courts are subordinate policymakers, "honest agents" who implement the directives of the legislature, or principal.¹⁶⁰ "From that principle flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to personal desires or individual conceptions of justice."¹⁶¹

156. This is obviously related to Legal Process constitutional scholars' "countermajoritarian difficulty" with activist judicial review. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

157. Judges Tatting and Keen in Fuller, *supra* note 106, at 631-37, object to legislative history as evidence of general intent on ground of legislative supremacy. I do not believe these hypothetical judges represent Fuller's views, however. See *supra* note 106.

158. See R. DICKERSON, *supra* note 52 (distinguishing between the "cognitive" function, which is the normal one in statutory interpretation, and the "creative" function, which is the exception); Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 *HOFSTRA L. REV.* 1125 (1983); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 *GEO. L.J.* 281, 292 (1989) (court cannot interpret statute to contravene an apparent textual meaning that is backed up by legislative history evidencing a similar specific intent).

159. R. DICKERSON, *supra* note 52, at 7.

160. The principal/agent theory was developed in Posner & Landes, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875 (1975), and the "honest agent" term is taken from Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 *HARV. L. REV.* 4, 60 (1984) (courts must be "honest agents of the political branches" whose role is to "carry out decisions they do not make").

161. Fuller, *supra* note 106, at 633.

These arguments suggest that Hart and Sacks' use of legislative history as evidence of general intent is problematic, because it expands the ambit of judicial discretion. If legislatures do not really have purposes or, more likely, have a congeries of purposes (sometimes in conflict), the "attribution" of purpose by the judge to the statute is often going to be judicial lawmaking rather than legislative lawmaking. By emphasizing overall legislative purpose, Hart and Sacks permit judges to rewrite legislation to fit their preferences, and to overrule majoritarian preferences they consider unreasonable.¹⁶² In this way Hart and Sacks' emphasis on legislative history's policy value may be countermajoritarian. This problem shows up in the *Bock Laundry* dissent. Not liking the unreasonable compromise apparently cut in Rule 609(a)(1), Justice Blackmun was able to massage a more reasonable result by relying on the "underlying rationale" suggested by the legislative history. Is this faithful to the original legislative expectations? A good argument can be made that it is not.

Hart and Sacks and their predecessors were aware of the honest agent metaphor for the judicial interpreter of statutes but resisted the conservative implications some have drawn from the metaphor. Accepting the policymaking supremacy of the legislature (the principal) does not negate the considerable discretion that the interpreter (the agent) should exercise, nor does it suggest that the discretion should not be exercised reasonably and consonant with the statute's purposes. "No superior wants a servant who lacks the capacity to read between the lines," Fuller suggested. "The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective."¹⁶³ It is clear that Rule 609(a)(1)'s specific phraseology was a drafting error,¹⁶⁴ and so why should the "honest agent" not revise the instructions in light of the statute's overall purposes? Does that revision violate the supremacy of the principal?

Here, the ambiguity of the agency metaphor for statutory interpretation should be emphasized. Hart and Sacks' use of legislative history as evidence of general intent is not inconsistent with agency duties for judges, if judges are viewed as "relational agents."¹⁶⁵ Most agents in real

162. See R. POSNER, *supra* note 76; Fuller, *supra* note 106, at 633-35 (views of Keen, J., in hypothetical case of "speluncean explorers").

163. Fuller, *supra* note 106, at 625; see H. HART & A. SACKS, *supra* note 109, at 1146-47 (creative servant hypothetical as example of context-dependent nature of interpretation).

164. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); see *Diggs v. Lyons*, 741 F.2d 577, 583 (3d Cir. 1984) (Gibbons, J., dissenting), *cert. denied*, 471 U.S. 1078 (1985) (given obvious "legislative oversight," interpreter should read Rule 609(a)(1) to create reasonable result).

165. I developed the argument that follows in Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989).

life are in fact relational agents, whose overriding duty is use of their best efforts to carry out their principals' directives to further the overall goals of the enterprise. In making the day-to-day decisions for the enterprise, the relational agent necessarily exercises considerable discretion, including discretion to correct apparently erroneous directives from the principal. In the real world, the relational agent can often obtain clarifying instructions from the principal (although many decisions will still be made without seeking clarification). Judges do not have that luxury in statutory interpretation and must work with directives that do not contemplate specific cases that arise. Whatever their decision, they are exercising considerable discretion. Hart and Sacks make the reasonable assumption that such discretion should be exercised to promote rather than defeat the purposes of the principal's enterprise, even if that means reaching decisions the principal originally would not have reached.

There is a countermajoritarian feature to the use of legislative history only as evidence of general intent, since sometimes judges will emphasize a purpose the original legislators would not have emphasized, and reach a result that might not have been accepted by the enacting Congress had it been put to a vote. But unless the statutory text clearly answers the interpretive issue, even an agency model for statutory interpretation contemplates creative decisions by the agent as consonant with the overall supremacy of the principal, who can always overturn the agent's decision with a more specific directive. The effect of Hart and Sacks' model is to shift the burden of inertia in favor of the more reasonable interpretation.

2. Perpetuating Outdated Statutory Schemes

Judge Easterbrook objects to Hart and Sacks' shifting the burden of inertia, in part because it perpetuates statutes that should be left to die.¹⁶⁶ His argument is that Article I of the Constitution gives each Congress a life span of only two years. For those two years, Congress enacts statutes as it can. Most statutes become outdated within years after enactment, and courts are tempted to update those statutes to continue to fulfill their original purposes. Hart and Sacks encourage this tendency. That is constitutionally questionable, Easterbrook argues, because it has the effect of extending the effective lifetime of the enacting Congress beyond the constitutional two-year period.¹⁶⁷

166. Easterbrook, *supra* note 53.

167. Justice Scalia has recently made a similar argument: "The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or

It is not immediately apparent that the limited tenure of each Congress has much relevance for statutory interpretation. When the Constitution was adopted, as now, statutes (if not their makers) were regarded as having an indefinite lifetime. Then, as now, statutes were regarded as ongoing enterprises. Then, as now, a leading precept of interpretation was the rule of *Heydon's Case*, that judges ought to interpret the statute liberally and reasonably to meet the "mischief" that the legislature sought to "cure."¹⁶⁸ To expect each subsequent Congress to update the statutory schemes of earlier Congresses seems unrealistic, given the limited agenda of each Congress and the many procedural obstacles to the enactment of statutory amendments. In short, the argument drawn from the limited tenure of legislatures is, by itself, a weak constitutional argument against the use of legislative history as evidence of general intent. The argument may be somewhat stronger in connection with an associated one, to which I now turn.

3. Liberal Principles

Complementing the argument from the limited lifetime of the legislature is the argument, made explicitly by Judge Easterbrook and implicitly by others,¹⁶⁹ that statutory interpretation should be as stingy as possible, to minimize government interference in private affairs. In other words, Hart and Sacks place the burden of inertia in the wrong place when they encourage the growth of law. The inertial forces written into the Constitution should make it easier for laws to wither away into irrelevance (unless Congress updates them).

Under this argument, our representative democracy, both in 1789 and today, is classically "liberal": it assumes the priority of private ordering over public ordering (extensive lawmaking is disfavored); legislative

ignoring the statutory language as changing circumstances require. To the contrary, it seems to me the prerogative of each currently elected Congress to allow those laws which change has rendered nugatory to die an unobserved death if it no longer thinks their purposes worthwhile, and to allow those laws whose effects have been expanded by change to remain alive if it favors the new effects." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part).

168. H. HART & A. SACKS, *supra* note 109, at 1144, quote from *Heydon's Case*, 76 Eng. Rep. 637, 638, 3 Co. 7a (Exch. 1584): "[T]he office of all Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

169. "Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government. There is still at least a presumption that people's arrangements prevail unless explicitly displaced by legal doctrine." Easterbrook, *supra* note 53; see H.L.A. HART, *LAW LIBERTY AND MORALITY* 30-34 (1963); Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 544 (1988).

lawmaking over judicial lawmaking (hence is very suspicious of judicial discretion); and pluralist legislating over republican legislating (laws are isolated deals, not organic and continuing creations).¹⁷⁰ Hart and Sacks' theory of legislative history violates all these preferences of classical liberalism, for it expands and updates governmental rules that interfere with private ordering, encourages judicial lawmaking, and often unravels deals ("devil's bargains") reached in the legislative process.

The vision of government underlying this argument is controversial. Historical scholarship suggests that the Framers of the Constitution were influenced by both the republican and the liberal traditions of politics and, hence, that the Constitution does not unequivocally embody either tradition completely.¹⁷¹ The liberal vision also slights the evolution of our democracy since 1789. Reconstruction and the New Deal have irreparably changed our view of government and its relation to private ordering.¹⁷² Even though the rhetoric of politics often emphasizes private ordering, the regulatory state is such a pervasive and accepted reality that the critical bite of the liberal rhetoric is lost. Hart and Sacks' theory is the New Deal applied to statutory interpretation. Even the "Reaganomics" of the 1980s did not undo the New Deal in American governance. One wonders why it should be undone in statutory interpretation.

Moreover, classical liberalism itself is a political theory that is increasingly controversial. Critical scholars argue the incoherence of its priority rules.¹⁷³ For example, liberalism's preference for private over public ordering tends to ignore the interdependency of the two. So-called "private" ownership of property actually depends upon "public" regulation, in the sense that the owner only controls the property because organs of the state (courts, the police) will protect her against usurpers. And so-called "public" regulation of property rights typically depends, in part, on "private" interactions to effectuate policy goals. Similarly, the liberal distinction between legislative and judicial lawmaking is overdrawn. A legislatively enacted statute's meaning is dependent upon what people predict courts or agencies will make of the statute. To call Hart

170. See generally Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (describing the political assumptions of "nominalist" statutory interpreters such as Scalia and Easterbrook).

171. See generally Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Sunstein, *supra* note 90.

172. See Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Ackerman, *The Storrs Lectures: Discerning the Constitution* 93 YALE L.J. 1013 (1984).

173. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

and Sacks' theory judicial "lawmaking" is similarly misleading, because the judge is in several ways constrained by the statutory language or the legislative history, both written by the legislature.

C. *Jurisprudential Critiques*

The Legal Process theory of legislative history has an impressive ability to elude political theory and constitutional critiques. The chief vulnerability of Legal Process theory may lie in its jurisprudential assumptions, which are now being closely questioned. Critics focus on Hart and Sacks' assumption of modified positivism, which is a mediating position that may be hard to sustain. It is unexpectedly difficult, for example, to figure out how Hart and Sacks answer the question, "What is law?" Is it commands of the sovereign (positivism), or is it rule of reason (natural law)? There is support in Hart and Sacks for either answer. On the one hand, the Legal Process materials emphasize that law is a purposive activity and that "[t]he idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."¹⁷⁴ On the other hand, the materials early on set forth the "principle of institutional settlement," which "expresses the judgment that decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed" (their principle of institutional settlement).¹⁷⁵ Hart and Sacks demand that law be reasonable (natural law) but also that citizens obey unreasonable laws until they are "duly changed" (positivism).

Hart and Sacks see no essential incoherence between their positivist and natural law features, perhaps because of their faith in proceduralism—deferring decisions to the most institutionally competent organ and requiring deliberative procedures will ensure that positive law will be reasonable law. As my earlier analysis suggests, however, proceduralism is an imperfect means for reconciling positive statutory law with reasonable law. A good deal of political theory indicates that the deliberative procedures advocated by Hart and Sacks for legislative decisionmaking do not yield purposive statutes, but instead yield statutes that are compromises whose purpose does not go beyond the narrow statutory language or, worse, statutes serving only the purposes of special interest groups. Thus, in many cases, Hart and Sacks are faced with statutory com-

174. H. HART & A. SACKS, *supra* note 109, at 1156.

175. *Id.* at 166.

promises that seem unreasonable. To resolve such cases, their theory must sacrifice either its essential positivism or its natural law goals.

Under this analysis, it is no longer clear how Hart and Sacks would decide *Bock Laundry*. They are highly ambivalent about violating plain textual meaning but will do so when there is a clear drafting "mistake."¹⁷⁶ It is reasonably clear that Congress made a mistake when it drafted Rule 609(a)(1), but it is not clear what the mistake was and what the purpose was. Justice Stevens, for the majority, thought that the mistake was in leaving out the word "criminal" before defendant, and that the purpose was to provide the balancing test to protect those parties for whom unfair prejudice might ultimately lead to the loss of liberty, namely, criminal defendants. Justice Blackmun, for the dissenters, thought that the mistake was in writing "defendant" rather than "party," and that the purpose was to provide the balancing test for persons who might unfairly lose their case because of the potential prejudice. Justice Stevens emphasized the positivist features of Hart and Sacks' theory: there is a special "oughtness" to the line-drawing apparently contemplated by the legislature, and the injustice of this line-drawing is one left to the duly-established procedures for correction, namely, through legislative overruling of *Bock Laundry*. Justice Blackmun emphasized the natural law features of Hart and Sacks' theory: the specific legislative command, and even the apparent specific purpose, of Rule 609(a)(1) "ought" to be interpreted reasonably to do justice in the specific case.

This debate between the approaches of Justices Stevens and Blackmun in *Bock Laundry* suggests the indeterminacy of Hart and Sacks' theory of legislative history. The indeterminacy flows in part from the tensions with their modified positivism. Hart and Sacks give us no criterion for choosing between their loyalties to positive law and natural law. Yet as I reread their materials, I have come to believe that if they had to choose they would fall back on positivism, for they not only assert that law can be unreasonable and that unreasonable laws must be obeyed, but they also insist that the existence of a law provides it with some normative authority. Thus they say:

When the principle of institutional settlement is plainly applicable, we say that the law 'is' thus and so, and brush aside further discussion of

176. For Hart and Sacks, interpretation cannot "give the words . . . a meaning they will not bear." *Id.* at 1200. This precept is "a corollary of the proposition that courts are bound to respect the constitutional position of the legislature and the constitutional procedures for the enactment of legislation. Courts on occasion can correct mistakes, as by inserting or striking out a negative, when it is completely clear from the context that a mistake has been made. But they cannot permit the legislative process, and all the other processes that depend on the integrity of language, to be subverted by the use of words." *Id.* at 1412.

what it 'ought' to be. Yet the 'is' is not really an 'is' but a special kind of 'ought'—a statement that . . . a decision which is the duly arrived at result of a duly established procedure for making decisions of the kind 'ought' to be accepted as binding upon the whole society unless or until it has been duly changed.¹⁷⁷

This principle of institutional settlement is linked to Hart and Sacks' claim that courts only engage in interstitial lawmaking. And it buttresses Justice Stevens' position in *Bock Laundry* that the procedurally correct way to change an unjust statute is by amendment, not judicial rewriting.

Indeed, this is sort of what happened in the aftermath of *Bock Laundry*. Within a year of the decision, the Supreme Court transmitted to Congress a proposed revision to Rule 609(a), pursuant to the Rules Enabling Act. The proposed revision applies the Rule 403 balancing test to determine the admissibility of prior convictions of any witness (not just a criminal defendant).¹⁷⁸ The Court transmitted the proposal to Congress in January 1990; revised Rule 609(a) became effective in December 1990, when Congress failed to defer its effective date or rewrite the Rule.¹⁷⁹ Although this course of events yielded a pretty good result in the end, it only deepens the legal process dilemma. The Court in *Bock Laundry* held that Congress in 1974 *intended* that Rule 609(a)'s balancing test only apply to criminal defendants, yet the same Court in 1990 exercised its delegated rulemaking power to reverse the legislative intent the Court had just discovered. All without batting an eye.

Although it is a position taken on faith as much as anything else, the positivist strain of Hart and Sacks has in fact dominated Legal Process discourse for the last thirty years. One consequence has been that their endorsement of dynamic statutory interpretation through attributed general intent has been subordinated to their concern that judicial discretion be limited. For example, the leading Legal Process treatise on statutory interpretation, by Dickerson, marginalizes dynamic statutory interpretation by establishing a formalized dichotomy between a court's ascertainment of the statute's meaning (which he calls the "cognitive function")

177. *Id.* at 4-5. See generally Fiss, *The Varieties of Positivism*, 90 YALE L.J. 1007 (1981).

178. Proposed new Rule 609(a)(1) was reported in the March 1, 1990 advance sheets for the Supreme Court Report, at cxxvii. It reads:

(a) General rule - For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused;

179. This is reported in the December 15, 1990 advance sheets for the Supreme Court Reporter, at page c.

and its assignment of meaning (the "creative function").¹⁸⁰ Even more recent scholarship endorsing dynamic statutory interpretation bows to Hart and Sacks' positivist fears of unlimited judicial discretion. For example, Professor Daniel Farber, a proponent of dynamic statutory interpretation, believes that legislative supremacy places tangible limits on judicial discretion.¹⁸¹

This analysis raises the possibility that Legal Process theory is not much more than a sophisticated version of Mechanical Jurisprudence, that is, that the goal of interpretation is to implement the preexisting positive law according to objective criteria. Legal Process talks of the positive law as policy rather than categories, and looks at more context, but is engaged in the traditional positivist inquiry notwithstanding its aspiration to make law a bit more accountable to reason. If this is so, Legal Process in the 1990s is subject to some of the same types of jurisprudential criticisms as those voiced against Mechanical Jurisprudence—that it creates a false sense of law's objectivity, that it subordinates the role of law as reason, and that it is a screen for oppressive social and ideological structures.

1. The Interpretive Critique

On a practical level, the main problem with traditional Legal Process is its inability to posit a theory of interpretation which creates interpretive closure. Following Hart and Sacks, Legal Process thinkers assume that most statutory language has an objectively determinable meaning, and that determinacy can be achieved for the exceptional case by looking at context, including reliable, competent, and probative legislative history.¹⁸² Legal Process theory rests upon a sophisticated theory of interpretation, in which meaning is not always objectively determinable if one only looks at the statute's text or a few conventional sources of legislative history. But Legal Process believes that by expanding the context to indicate the complete story of the statute's enactment and evolution, especially its underlying policies, an objectively determinable meaning will emerge for any rational interpreter.

180. See R. DICKERSON, *supra* note 52, at 13-34; see also *id.* at 15-16, 24-26 (rejecting Legal Realists' emphasis on the creative function; statutory interpreter is like an antiques restorer who fills in a tiny piece of a vase).

181. "When statutory language and legislative intent are unambiguous, courts may not take action to the contrary." Farber, *supra* note 158, at 292.

182. E.g., R. DICKERSON, *supra* note 52, at 85: "[T]he best working approximation of this actual intent is the intent that it is most plausible to infer from the appropriate objective manifestation of intent, which is, in the case of cognition, the statute as read in its proper context and, in the case of creation, the statute as read in its proper context supplemented by other relevant and reliable extrinsic evidence"

This underlying vision of interpretation is appealing but ultimately unpersuasive.¹⁸³ One problem is that Legal Process understates the importance of the interpreter's perspective.¹⁸⁴ Different interpreters will ask different questions of the text and legislative history, will organize and analyze the evidence differently, and will bring different insights to bear on the analytical issues. Not surprisingly, their interpretations of the same text and legislative history will often be different, and their different interpretations do not result from different levels of rationality. This, I believe, is what occurred in *Bock Laundry*, where Justices Stevens and Blackmun looked at the very same evidence and came up with very different interpretations. Both Justices present persuasive analyses for their views, based upon "objective" evidence, and I do not believe that either Justice was being "result-oriented" or "dishonest" (the usual law professor's attacks). I find Justice Blackmun's analysis more persuasive, not because I believe it is more objective and determinate, but because it better fits with my own reaction to the facts of this case, my experience of juries' reactions to such impeaching evidence, and my overall perceptions about the best role for such evidence.

A second, related, problem is that Legal Process overemphasizes the constraining nature of context. Legal Process tends to view context itself as essentially static and preexisting. This view is naive.¹⁸⁵ The legislative history of Rule 609(a)(1) is not a fixed context. Like the statute itself, it is subject to interpretation. What the legislative history "is" depends upon what the interpreter physically finds, what she then selects from the materials available, what background values or assumptions influence her reading of the materials, and how individual materials fit with the big picture. In *Bock Laundry*, for example, all nine Justices agreed that the legislative history supports the view (going against the statute's text) that Rule 609(a)(1) does not require the possibly unconstitutional discrimina-

183. On interpretive theory, see generally INTERPRETING LAW AND LITERATURE: INTERPRETATION AFTER THE END OF CONSENSUS (S. Levinson & S. Mailloux eds. 1988); *Interpretation Symposium*, *supra* note 95; *Law and Literature Symposium*, *supra* note 95.

184. "A sentence will never mean exactly the same thing to any two different people or even the same thing to one person on different occasions." Hutchinson & Morgan, *The Semiology of Statutes* (book review), 21 HARV. J. LEGIS. 583, 593 (1984); see S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980) (reader-response theory of interpretation); H.-G. GADAMER, *TRUTH AND METHOD* (J. Weinheimer & D. Marshall trans. 2d rev. ed. 1989) (interpretation is a dialogue between text and interpreter).

185. J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 123-24 (1982): "Context is boundless in two senses. First, any given context is open to further description. . . . Meaning is determined by context and for that very reason is open to alteration when further possibilities are mobilized. Context is also unmasterable in a second sense: any attempt to codify context can always be grafted onto the context it sought to describe, yielding a new context which escapes the previous formulation."

tion between civil plaintiffs and defendants. Note the importance of "possibly unconstitutional," a value shared by all nine Justices. If that filtering value were not held by all the interpreters, the Court might well have split on that issue as well, because the legislative history nowhere rebuts the text's indication that all defendants get the benefit of the balancing rule, and no plaintiffs do.¹⁸⁶

A final problem is Legal Process' unreflective acceptance of the subject/object dichotomy.¹⁸⁷ That is, it envisions interpretation as the interpreter's (subject's) retrieval of a pre-existing meaning (an object) from the text. Although Legal Realism deconstructed that metaphor, it implicitly accepted the dichotomy, which it tended to reverse, arguing that the subject imposes her views onto the object. Fearing the countermajoritarian implications of such a metaphor, the tendency since the 1940s has been to return to the original metaphor (but with some flexibility for the object to change over time). The subject/object dichotomy has been philosophically quite controversial for some time,¹⁸⁸ and a more robust theory has been suggested by hermeneutics, that interpretation is a dialogue between the interpreter and the text, in which the interlocutors create a common meaning which does not preexist the dialogue.

2. The Social Critique

For critical scholars, this interpretive analysis is merely symptomatic of a larger problem with Legal Process in particular, and any jurisprudence based upon classical liberalism in general.¹⁸⁹ Like other liberal theories, Legal Process assumes that preferences are exogenous and incommensurable—there is no objective way to favor my preferences, or interests, over yours (all is political). In a democracy, we accept the legislature's political decisions which favor and disadvantage interests, because legislators are accountable to the people and can be disciplined if they make poor political choices. The legitimacy of "political" decisions by unelected judges cannot be defended in this way, because they are not

186. The CONFERENCE REPORT, *supra* note 124, at 9-10, speaks flatly of the distinction between a "defendant" and a "nondefendant witness," and nowhere does the report say or suggest that civil defendants do not share the benefits of the balancing test. The report does, however refer to the possibility of "persuading the trier of fact to convict the defendant on the basis of his prior criminal record." *Id.*; see also 120 CONG. REC. 40,894 (1974) (remarks of Rep. Dennis, a member of the conference) (emphasizing application of Rule to defendant sued by government).

187. See Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1154 (1985).

188. See generally R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983).

189. See generally M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); R. UNGER, *supra* note 173; Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

accountable to the democratic process. Hence, liberal theories need to show that judicial decisions are linked up to something legitimate. Mechanical Jurisprudence linked statutory interpretation decisions with the specific intent of the legislature, and Legal Process linked them with the legislature's general intent.

The interpretive critique suggests that liberal theories, including Legal Process, may never quite be able to escape this counter-majoritarian difficulty. In statutory interpretation, liberal theory demands that all decisions be traceable back to policy choices made by the legislature, but as a practical matter admits that the legislature cannot make the case-by-case determinations itself. Yet once those decisions are delegated to unelected judges, they will of necessity be making political decisions. The ostensible "constraining methodology" they adopt will not significantly reduce judicial discretion, because the methodology does not capture what goes on in making a decision and is easily manipulable in the hard cases.

Critical theory makes an even more telling criticism of Legal Process. It asks why all these prominent scholars expended so much effort from 1938 to 1958 in creating an elaborate construct to support the "objectivity" and "neutrality" of law. The effort seems in retrospect to have been an extravagant exercise in self-justification by America's elites—that in a world of moral skepticism, our democracy was legitimate in ways that Nazi Germany and Communist Soviet Union were not.¹⁹⁰ "We" had a "rule of law," while all "they" had was "government by bayonet." Of course, once it becomes apparent that many political decisions in America are really made by unelected judges, our democracy comes to look more elitist and less procedurally defensible. The irony, argue critical scholars, is that "our" rule of law was something of a fraud in this period, when African Americans did not have the right to vote and were segregated from the rest of society, when women were suppressed and often brutalized within the family and the legal system, when gay men and lesbians were persecuted and institutionalized by a repressive medical-political juggernaut, when protesters were beaten, jailed, lynched, and reviled. For many Americans, reality was more like Solzhenitsyn's *gulags* than it was like Hart and Sacks' sanitized "legal process."

A critical appraisal of the lived existence of non-elite Americans during the formative period of Legal Process deprives its proceduralist

190. This paragraph is based upon Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988).

strategy of much of its cogency. For then Legal Process is not only unable to demonstrate that judicial decisions are tightly linked with original legislative policy choices, but (more seriously) is unable to justify its original deference to legislative policy choices. If the legislature itself is captive of elite interests (the pluralist game is stacked), and if many Americans are formally or functionally excluded even from political participation, then it is hard to justify deference to the legislature at all. What is even more remarkable than this startling conclusion is Legal Process' failure even to ask this sort of question.¹⁹¹ That is some evidence of its theorists' slavish devotion to the status quo and the legitimization of the privileged position of elites such as themselves.

3. The Natural Law Critique

The interpretive and social critiques contend that Legal Process has failed in its effort to take the politics out of statutory interpretation (and in fact may have submerged it for class reasons). In light of these critiques, it is particularly noteworthy that the 1980s saw a recrudescence of theories explicitly recognizing the value-laden nature of law, including judicial decisions.¹⁹² Hart and Sacks' proceduralism reflected a moral skepticism common to Anglo-American law in this century: If we cannot ensure the objectivity of policy choices (which Hart and Sacks shuttled off to the legislature), we can at least assure objectivity and neutrality in the procedures by which law is made and changed. New theories emphasize the normativity of law—the ability of law to contribute to a community's political development.

Consider in this regard Ronald Dworkin's distinction between a "rulebook community" and a "community of principle."¹⁹³ In the former, people follow the rules because they are rules; their legitimacy derives from their positivistic pedigree, including the accepted procedures of their creation. In a community of principle, citizens follow the rules because they reflect the great and admirable principles for which the polity stands. Dworkin argues that the rulebook community is a shallow vision of polity, because it isolates citizens from one another and undermines the emotional interrelationships essential to a people's bonding

191. See Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981); Peller, *supra* note 190.

192. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); P. SOPER, *A THEORY OF LAW* (1984); L. WEINREB, *NATURAL LAW AND JUSTICE* (1987); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1418 (1988).

193. R. DWORKIN, *LAW'S EMPIRE* 208-15 (1986).

into a true polity.¹⁹⁴ In contrast, the community of principle is a worthy vision of polity. Such a community creates bonds of common concern among citizens and encourages political dialogue that assures political vigor and strength.¹⁹⁵

III. THE TRUTH VALUE: LEGISLATIVE HISTORY AS EVIDENCE OF META-INTENT

Twentieth century American jurisprudence has seen the intellectual rise and decline of two theories of legislative history, as evidence of either specific intent (Mechanical Jurisprudence) or general intent (Legal Process). We are now moving into a post-Legal Process era which offers no single, prevailing theory of legislative history (yet). There is a rich array of theories, however, each of which returns to an earlier tradition and develops it imaginatively in light of modern intellectual insights. One post-Legal Process direction is to adopt the astringent positivism of the New Textualism being developed by Justice Scalia and Judge Easterbrook. Their theory returns to the approach of the nineteenth century treatises, which interpreted statutes by reference to the plain meaning of the statutory language, the whole statute and related statutes, and canons of statutory construction. Under this theory, legislative history is usually irrelevant to statutory interpretation (legislative history as evidence of nothing).¹⁹⁶ The New Textualism is an impressive theory of legislative history. As *Bock Laundry* suggests, the current debate on the Supreme Court is, for the most part, between the New Textualism and Imaginative Reconstruction. Both assume that statutory interpretation seeks to retrieve the positive law put into the statute by the legislature. The two theories differ as to their willingness to consider the more subjective features of legislative intent. Given the common assumptions (positivism and legislative supremacy), I consider the Court's traditional approach superior to that of the New Textualism. Intellectually, their common jurisprudential assumptions render both theories unsatisfying.

A second post-Legal Process direction is away from positivism, and toward the view that statutory interpretation is a value-laden process, a

194. *Id.* at 212.

195. *Id.* at 213.

196. The New Textualism is defended in Easterbrook, *supra* note 53; Easterbrook, *Original Intent*, *supra* note 24; SCALIA, *LEGISLATIVE HISTORY SPEECH*, *supra* note 22; and in the judicial opinions of these jurists and those influenced by them. The New Textualism is critically analyzed in Eskridge, *supra* note 6; Ross, *Reganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399 (1990); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term*, 39 AM. U.L. REV. 277 (1990); Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

search for "truth" or the "best answer," variously defined. This emerging direction I call Normativism.¹⁹⁷ Normativists believe that law is more than the sovereign's commands and is ultimately accountable to reason, that judges have a special duty and capacity for developing statutes in accord with reason, and that courts should engage in creative and dynamic statutory interpretation. Because of its present-mindedness, Normativist theory has tended to reject the authority value of legislative history, and not to give much attention to other potential values legislative history might serve.¹⁹⁸ Michael Moore, for example, has argued that considering legislative history serves none of the traditional values invoked for it.¹⁹⁹ Yet his argument seems to assume that the only use of legislative history is as evidence of specific intent²⁰⁰ and relies mainly on the traditional critiques of that theory. Like other Normativist scholars, he does not explicitly consider the possibility that legislative history might serve other values.

Consistent with Normativism is the notion that legislative history might have a *truth value*. That is, legislative history may be useful in illuminating the best meaning that can be quarried out of the statute. To be sure, we are not accustomed to thinking of legislative history as evidence of best meaning, but a moment's reflection will suggest the potential usefulness of the idea. Consider *The Federalist Papers*, the newspaper articles written by Madison, Hamilton, and Jay in support of New York's ratification of the Constitution. They are routinely cited in Supreme Court opinions and theoretical writings, ostensibly for their authority value or purpose value, as evidence of what the Framers specifically or generally intended the Constitution to require.

Yet all the traditional objections—and more—to using legislative history apply with substantial force to *The Federalist Papers*.²⁰¹ The es-

197. See Eskridge, *Metaprocedure* (book review), 99 YALE L.J. 945, 964 (1989); see also Eskridge & Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991). Leading Normativist works on statutory interpretation are Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); R. DWORKIN, *supra* note 193; Eskridge, *supra* note 170; Hurd, *Sovereignty in Silence*, 99 YALE L.J. 943 (1990); Moore, *supra* note 192; Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989); Sunstein, *Interpreting the Regulatory State*, 102 HARV. L. REV. 405 (1989).

198. See Aleinikoff, *supra* note 197, at 49-50 (Normativist theory treating statute "as if it had been enacted recently"); Hurd, *supra* note 197 (arguing that statutes are not "communicative utterances" and hence showing little interest in their history); Sunstein, *supra* note 194 (arguing against intentionalist theories and in favor of "background norms" as the key to statutory interpretation).

199. Moore, *supra* note 192, at 352-58.

200. The section of the article referred to in *supra* note 192 is entitled, "The Moral Case Against Intentionalist Interpretation."

201. See generally A. FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* (1984), for the line of argument that follows.

says represent the views of three people, two of whom were not even delegates to the Philadelphia Convention. Hence, there is no rigorous way to tie the authors' views to the views of most of the Framers. Nor can the authors' views be tied to the views of most of the ratifying delegates, even in New York, much less in the other ratifying states. Nor can the views of Madison in his essays be confidently attributed to Hamilton (who had very different ideas about the Constitution) or Jay (whose ideas remain largely unknown to us). Nor can the ideas of the authors even be confidently attributed to the authors themselves, for the essays were, after all, propaganda documents, seeking to beat down anti-federalist objections to ratification. In short, any realistic analysis of *The Federalist Papers* is devastating to their authority and purpose values.

Why, then, are *The Federalist Papers* so widely cited and relied upon? One important reason is their truth value. *The Federalist Papers* contain at least fragments of a political theory that has been robust over time and changed circumstances. To be sure, most of the discussion addresses issues of only local interest or makes assumptions overtaken by time, and therefore has little truth value for us today. But what is astounding is how many arguments seem just as fresh and interesting and useful today as they did 200 years ago. For example, Madison's concept that government should be structured so that ambition would counter ambition (and that this is a good way to protect our liberty) was persuasive to many in 1789, and has been invoked throughout our constitutional history as an insight bearing on a variety of problems in a variety of situations. This type of robustness (the ability of a concept to prove useful in a variety of different situations) is some evidence of its truth value.

While not penned by the likes of Madison and Hamilton, the legislative history of statutes usually contains arguments and ideas that are quite productive of insights as to the most reasonable result. For all its flaws, the legislature in our representative democracy has substantial institutional advantages in gathering and digesting evidence about the nature of national problems and possible solutions, affording a broad range of relevant groups a forum to air their views, and engaging in actual debate. Thus, Normativist theory would assume that the legislature has (or is claimed to have) a meta-intent that statutory laws contribute to the rule of reason and good policy in our country, and would posit that statutes should be interpreted to that effect. Thus, the Court in *Bock Laundry* should have examined the legislative history of Rule 609(a)(1), not to discover what Congress has commanded the Court to do, but to figure out what is the most reasonable rule for treating prior convictions of

testifying parties in a civil case. This perspective may have been the driving force behind Justice Blackmun's dissent.

Normativist theory of legislative history as evidence of meta-intent is subject to the same sorts of critiques as the other theories (political theory, constitutional, and jurisprudential). Not surprisingly, the New Textualists and traditional Legal Process scholars object that the truth value of legislative history is a naive view of the legislative process and gives judges too much power. In my view the most interesting objections to the theory come from the third direction for post-Legal Process thought, Critical Legal Studies (CLS), which in some ways retrieves the iconoclasm and critical alertness of the most skeptical Legal Realists. Though CLS has not dwelled on issues of statutory interpretation, at least one critical objection to Normativist theories is that such theories are insufficiently critical of ideologically distorted traditions.

A. *The Jurisprudential Critique*

Like other theories of legislative history, Normativism makes certain jurisprudential assumptions that might be questioned. These assumptions are that: (1) law is accountable to reason, and a statute without reason is not law (the natural law assumption); (2) making law is a collaborative process, involving not just the legislature and the courts, but the community as well (the popular sovereignty assumption); and (3) for interpretive issues, there are right and wrong answers that can be demonstrated (the best answer assumption). In this section, I shall focus on the last assumption.

Normativism assumes that there is a "best" interpretation that is accountable to reason, and not will or even policy. Obviously critical to this enterprise is what Normativism means by "best" and whether the Normativist criterion is jurisprudentially defensible. There is substantial doubt whether Normativism can meet this challenge. Consider three potential criteria for truth: moral reality, coherence and integrity, and practical reasoning. The remainder of this section will set out the theories defending these different criteria, apply them to *Bock Laundry*, and suggest problems with each Normativist theory.

1. Moral Realism

One definition of a Normativist "best answer" would be the answer to an interpretive question which corresponds to moral reality. Professor Heidi Hurd has proposed an outline for a theory of statutory interpretation along the following lines. Statutes cannot be viewed, under any rig-

orous philosophic system, as communicative utterances, commands from the legislature to the population. Instead of viewing statutes as "signals" of some intended communication, therefore, Hurd views them as "signs" of optimal social arrangements (moral reality).²⁰² To the extent that a statute does not adequately reflect optimal social arrangements, it is not law.²⁰³ Hence, statutory interpretation is an exercise in determining the optimal state of affairs for the case.²⁰⁴ Hurd's theory does not set forth a role for legislative history, though it clearly rejects any authority value for legislative history (or for the statute itself). If legislative history were to play a role in her theory, it would be useful only for its truth value. Thus, Hurd's theory would be an interesting Normativist framework for understanding the value of legislative history.

There are a number of jurisprudential difficulties with Hurd's theory: few philosophers believe in moral realism generally (especially in connection with social arrangements); fewer still believe that any moral reality could be known by us; and I know of no philosopher who posits that the legislature is capable of such discovery on a regular basis.²⁰⁵ For obvious reasons, I cannot explore these quandaries satisfactorily in this article, but my case study of Rule 609(a)(1) does illustrate a few of the difficulties with moral realism as the lens through which we evaluate legislative history (or statutes).

The legislative history of Rule 609(a)(1) is an illuminating debate between two visions of the use of criminal convictions to impeach witnesses. On the one hand, the House Judiciary Committee majority, and especially Representative Dennis, argued that the use of criminal convic-

202. "Thus, under the non-communicative model of legislation . . . statutes issued by the legislature are not to be thought of as commands, orders, requests, threats, promises, or any other kind of communication whereby a speaker indicates what he or she wants done. Rather, statutes are to be thought of as descriptions—not as communications by a speaker to an audience with the elocutionary intent to inform but, instead, as results of inquiries recorded by a uniquely situated observer." Hurd, *supra* note 197, at 996-97; see *id.* at 995 (statutes are to be considered "signs," that is, "symptoms of conditions in the world to which they are causally related," and not communicative "signals"); *id.* at 996 ("legislative utterances describe legal states of affairs in a manner which, if made under appropriate circumstances, may function as signs of the existence and nature of those phenomena").

203. "Since on the model that I have sketched, statutes obligate citizens only to the extent that they accurately describe the antecedently-existing obligations of citizens, statutes are sometimes not law." *Id.* at 1025-26.

204. "[A] non-communicative model of legislation would call upon courts to interpret a statute by seeking to discover and to achieve the optimal state of affairs of which the statute is a natural sign." *Id.* at 1028. Hurd then goes on to make a statement which suggests she does not completely endorse the implications of her own theory: "This is no more than a long-winded way of saying the familiar: that courts should interpret statutes in light of the purposes that they may best be made to serve." *Id.*

205. See *id.* at 1000-06 (dealing with some of these objections, but fully aware that answering them would be a lifetime project).

tions to impeach a witness is unfair, because prior convictions (unless they involved a *crimen falsi*) are scant evidence of the witness' credibility in a particular case. When a party is so impeached, there is a great danger the jury will penalize the party more because of her criminal conviction than because of the evidence she presents to the jury.²⁰⁶ Dissenting from the committee report, Representative Hogan argued that prior convictions are always relevant to impeach any witness, since "justice would seem to me to require that the jury know that the witness had been carrying on a private war against society."²⁰⁷ The House rejected this argument and adopted the committee's bill, but the Senate accepted Representative Hogan's argument when it adopted the McClellan amendment.²⁰⁸

How would a moral realist approach this problem? There is considerable evidence that the Dennis arguments are the better arguments. The Hogan position is the traditional one. It rests upon two assumptions now considered quite questionable. The first is "trait theory," which posits that each of us has a character consisting of a web of interrelated traits, and that our conduct in any situation is driven by those traits.²⁰⁹ Under this theory, we can predict future conduct from a character analysis developed from traits revealed in seemingly different contexts—someone who steals a car in one context is more likely to be a liar in a different context.²¹⁰ Trait theory is now considered highly naive by social psychologists, who believe our conduct is more dependent upon contextual and interactive factors, and are skeptical of predictive theories generalizing from conduct in different situations.²¹¹

206. See, e.g., CONFERENCE REPORT, *supra* note 124, at 9-10; 120 CONG. REC. 2377 (1974) (remarks of Rep. Dennis, the main committee supporter of its draft of Rule 609(a)).

207. 120 CONG. REC. 2376 (1974) (remarks of Rep. Hogan).

208. Senator McClellan's attack on the Senate Judiciary Committee's bill was very similar to the Hogan argument, e.g., *id.* at 37076-77, and proponents of the Senate Committee approach made similar arguments to those made by the House Committee. E.g., *id.* at 37078 (memorandum of Sen. Hart); *id.* at 37080 (remarks of Sen. Kennedy). The Senate ultimately agreed to the McClellan amendment. *Id.* at 37083.

209. See generally G. ALLPORT, PERSONALITY—A PSYCHOLOGICAL INTERPRETATION 339 (1939) (character traits "are not creations in the mind of the observer, nor are they verbal fictions; they are here accepted as biophysical facts, actual psychological dispositions").

210. See Burton, *Generality of Honesty Reconsidered*, 70 PSYCHOLOGY REV. 481, 482 (1963) (person who would steal in one situation would lie in others). But see H. HARTSHORNE, M. GAY & F. SHUTTLESWORTH, STUDIES IN ORGANIZATION OF CHARACTER (1930) (early empirical study finding little consistency in honest versus dishonest behavior).

211. "Social psychology data reflect conclusions that prior convictions have virtually no probative value as a predictor for determining a witness' in-court veracity." Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 32 (1988); see Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 29-30 (1986).

Professor Foster notes that most social psychologists now reject trait theory and rely on contex-

The second vulnerable assumption is that juries, properly instructed by the judge, will not overgeneralize from the prior conviction to penalize a party so impeached. This, too, is now questionable.²¹² Attribution theory suggests that people tend to attribute their own actions to situational facts, while attributing the actions of others to trait factors.²¹³ As a result, they tend to overgeneralize evidence suggesting "bad character" and, probably, prejudge the impeached party's case. There is good reason to believe from scattered empirical and other evidence that cautionary instructions from the judge do little to counteract this prejudgment.²¹⁴

The *Bock Laundry* issue is one for which there is substantial legal and social science commentary, yet I doubt we can ascertain the morally certain answer. I find the Dennis arguments more normatively persuasive, but have to admit that the social science evidence presented above is still largely theoretical, and I have found no strong empirical data on the precise *Bock Laundry* issue. The persuasiveness of the Dennis arguments, it seems to me, rests upon my own web of beliefs that are rooted in the intellectual discourse of the 1980s and that, like the intellectual discourse of other decades, may well be obsolete by the next decade. I also realize that my receptiveness to these arguments is influenced by all sorts of unproven assumptions I have made—including the assumption that other things juries consider when they make credibility determinations ("demeanor of the witness"?) are any more reliable—and by my feeling that Paul Green received an unfair trial in *Bock Laundry*. A book could be (and should be) written on this issue, but I doubt that it would discover a universal moral reality to solve this issue.

tual (situational) theories to explain one's likelihood to tell the truth in any given situation. *E.g.*, S. HAMPSON, *THE CONSTRUCTION OF PERSONALITY* 63 (1982); H. EYSENCK, *THE STRUCTURE OF HUMAN PERSONALITY* (1970); D. PETERSON, *THE CLINICAL STUDY OF BEHAVIOR* 23 (1968) (rejecting trait theory after ten years of unproductive research); Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758 (1975). Professor Allport, the main academic parent of trait theory, has admitted problems with his theory in Allport, *Traits Revisited*, 21 AM. PSYCHOLOGIST 1, 9 (1966).

212. "The law assumes that jurors have the ability, aided by cautionary instructions, to place even highly prejudicial information in appropriate perspective. This assumption is belied by extensive, uncontroverted social psychology findings that serious distortions routinely plague the process by which impressions of others, and consequent judgments about others, are formed." Foster, *supra* note 211, at 32-33; see *id.* at 35.

213. See R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 31 (1980) (people tend to attribute their own actions to situational factors, while attributing the actions of others to trait factors); Alexander & Epstein, *Problems of Dispositional Inference in Person Perception Research*, 32 SOCIOMETRY 381 (1969); see also G. ALLPORT, *supra* note 209, at 521 (tendency of people to overestimate the role that one known trait plays in the character of another); Foster, *supra* note 211, at 35.

214. See Foster, *supra* note 211, at 23-25.

Even if it did, the book would not solve the *Bock Laundry* problem. If the Dennis position were morally correct, the statute should be interpreted never to allow such impeaching evidence, and perhaps should not allow impeachment by *crimen falsi*. Yet both moves cut against the text of the statute and the compromise reflected in the legislative history. Hurd indicates that a statute not reflecting moral reality is not law, which means she might just throw out Rule 609 altogether. But such an unconventional move might ultimately be inconsistent with her theory. The optimal social arrangement for our society may be to enforce legislative compromises (this serves majoritarian, pluralist, and rule of law values).²¹⁵ If that is so, then a moral realist has to recognize the necessity of compromise. What is the morally optimal compromise? Who knows? Determining moral reality is hard to do, especially when talking about legislation. The statutory interpreter has to figure out the morally correct answer to the problem in the abstract, and then has to figure out the morally optimal level of enforcement to give to legislative utterances that might not otherwise be optimal solutions to the problem.

2. Coherence

Even lawyers and legal scholars who do not evaluate arguments based upon moral reality do believe that arguments are right or wrong. How do lawyers make such judgments? The main criterion is coherence. An argument is better if it is more consistent with commonly understood grammar rules, constitutional assumptions, or theories of social psychology, than if it is inconsistent with these sources. The leading coherence theory today is Professor Dworkin's theory of "law as integrity."²¹⁶ Dworkin posits that "integrity in legislation," which requires lawmakers to try to make the total set of laws coherent, is "so much a part of our political practice that no competent interpretation of our practice can ignore it."²¹⁷ Judges have a similar duty ("integrity in adjudication") to "treat our system of public standards as expressing and respecting a co-

215. Hurd resists this idea, stating that legislation representing "political compromise" is entitled to "little authority." Hurd, *supra* note 197, at 1000. It is unclear what she means by "little authority" (if legislation does not reflect moral reality, I should have presumed that Hurd would give it "no authority"), and in any event she is trapped by the elastic nature of "social arrangement" she is seeking to "optimize." If the social arrangement includes the rule of law values—which have long been accepted by natural law theorists—then it might be "optimal" for the court to enforce a political compromise.

216. The main outlines of Dworkin's theory of law as integrity, as it applies to statutory interpretation, are set forth in R. DWORKIN, *supra* note 193, at 45-86, 176-275, 313-54. See also R. DWORKIN, A MATTER OF PRINCIPLE (1985); Dworkin, *The Forum of Principle*, 56 N.Y.U.L. REV. 469 (1981).

217. R. DWORKIN, *supra* note 193, at 176.

herent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones."²¹⁸ Specifically, Dworkin argues that statutory interpretation is like a "chain novel," in which the statute and its legislative history are the primary chapter in the novel, and subsequent authors (judges and agencies) write new chapters.²¹⁹ The goal of the seriatim contributors is to make the novel the "best," most coherent work it can be.²²⁰ The judge "interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of the continuing story, and his interpretation changes as the story develops."²²¹

Dworkin develops a coherence theory of legislative history. He treats legislative history as part of our community's public activity. The community of principle is shaped in part by the public values proclaimed and relied upon by the legislators who deliberated about the statute,²²² and any public consensus revealed by the legislative deliberations carries great weight in statutory interpretation, even though the interpreter personally disagrees with that consensus.²²³ While Dworkin agrees that legislative history does not have the operative significance of the statutory text,²²⁴ it nonetheless is an expression of public values. An interpretation that is coherent with the formally expressed expectations of the legislature is much better than one at odds with those expectations.²²⁵ Unlike

218. *Id.* at 217; *see id.* at 225 (judges should "identify legal right and duties . . . on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness").

219. *Id.* at 228-75; *see Dworkin, Law as Interpretation*, 60 TEX. L. REV. 527, 541-43 (1982), reprinted in 9 CRIT. INQUIRY 179 (1982), and THE POLITICS OF INTERPRETATION (W.J.T. Mitchell ed. 1983) (Dworkin's initial exposition of the chain novel metaphor).

220. R. DWORKIN, *supra* note 193, at —. The judge is "a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. He will ask himself which reading of the act . . . shows the political history including and surrounding that statute in the better light. His view of how the statute should be read will in part depend on what certain congressmen said when debating it. But it will also depend on the best answer to political questions: how far Congress should defer to public opinion in matters of this sort, for example."

221. *Id.* at 348.

222. *Id.* at 342-47.

223. In discussing *TVA v. Hill*, 437 U.S. 153 (1978) (the celebrated "snail darter case"), Dworkin emphasizes that even if the interpreter thinks it best to protect endangered species at virtually any cost, the interpreter ought to defer to contrary public sentiment, as expressed in the legislative debates. R. DWORKIN, *supra* note 193, at 340-41.

224. Dworkin makes the following analogy: Statutory text is like a promise, canonically binding on the promisor (both morally and legally). Legislative history is like the explanation given by the promisor. It is not binding (the promisor can act contrary to the explanation so long as she does not break the promise), but does have moral force (unless circumstances have changed, the promisor is acting more responsibly if she acts in accord with the reasons given for her promise). *Id.* at 343-45.

225. "[L]egislation is seen in a better light, all else being equal, when the state has not misled the public; for that reason [the interpreter] will prefer an interpretation that matches the formal statements of legislative purpose" *Id.* at 346.

Hurd's moral realist, Dworkin's statutory interpreter "is not trying to reach what he believes is the best substantive result, but to find the best justification he can of a past legislative event."²²⁶

Nevertheless, it is not clear that Dworkin's theory would resolve the *Bock Laundry* puzzle any more satisfactorily than Hurd's theory. Dworkin's coherence-based theory is complicated by the existence of two different kinds of coherence arguments, namely, horizontal coherence, an interpretation's fidelity to currently held policies and principles, and vertical coherence, an interpretation's fidelity to policies and principles of the past.²²⁷ Oftentimes, fidelity to one type of coherence will mean infidelity to the other. Thus, the Court in *Bock Laundry* emphasized the coherence of its interpretation with the traditional common-law rule, Congress' rejection of a gentler rule for the District of Columbia in 1970, and much of the legislative history of Rule 609(a)(1).²²⁸ Although not emphasized in the opinion, the Court's interpretation is also coherent with traditional assumptions made about human character (*i.e.*, trait theory). The Court's interpretation is on the whole supported by arguments of vertical coherence. The dissenters emphasized the incoherence of this interpretation with the modern trend in the common law to exclude such evidence, academic criticism of the old common-law doctrine, and Rule 403 and the general purposes of the Rules of Evidence.²²⁹ Although not emphasized by the dissenters, their interpretation is also coherent with recent theories in social psychology (*i.e.*, attribution theory). Their interpretation is on the whole supported by arguments of horizontal coherence. It is not completely clear under Dworkin's theory how the interpreter chooses between vertical and horizontal coherence arguments.

This is a general tension within Dworkin's theory, and however Dworkin resolves the tension, he subjects his theory to important difficulties. Dworkin's chain novel metaphor suggests a priority for vertical coherence arguments, because each seriatim author is required to make her chapter coherent with all the chapters that have gone before, and to make the novel the best one it can be. A preference for vertical coher-

226. *Id.* at 338. Dworkin continues: "He tries to show a piece of social history—the story of a democratically elected legislature enacting a particular text in particular circumstances—in the best light overall, and this means his account must justify the story as a whole, not just its ending." *Id.*

227. These two types of coherence are suggested by Dworkin's work and are formally developed in Eskridge, *supra* note 41.

228. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) (rehearsing the arguments in text and invoking the canon that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change").

229. *Id.* at 530-535 (Blackmun, J., dissenting).

ence may also be implicit in Dworkin's general observation that the best interpretation must also take account of our political conventions and expectations. If this is the case, Dworkin's theory is subject to objections that it is too conservative. Many traditions contributing to a rule's vertical coherence are traditions distorted by gender, race, and class oppression and prejudice,²³⁰ and are perpetuated over time by little more than unreflective inertia or outdated mindsets. Why should these principles continue to control current interpretation?

On the other hand, Dworkin's community of principle ideal suggests a priority for horizontal coherence arguments, because the community will not feel integrated in its shared principles if many of them are shared only because of an uncritical fidelity to the past. If this is the case (and I believe it is), Dworkin's theory is subject to the objection that it is indeterminate and ultimately elitist. A central problem with focusing on horizontal coherence is that current context is infinitely elastic. The interpretation in *Bock Laundry* seems unfair to me, because some studies suggest it is incoherent with current views of social psychology. These studies suggest that people will prejudice based upon a prior bad act.²³¹ Therefore, it is further incoherent with the due process principle that a person's case should not be lost simply because the jury does not "like" her (the Dennis argument). But the Court's interpretation is coherent with the principle, announced in much of the legislative history, that a convicted felon should not stand on the same level of credibility as other witnesses (the Hogan argument).

How would Dworkin choose between these two principles? I suspect he would choose the former (avoid likely prejudice by restricting the admissibility of prior convictions), because it better fits his own view of the matter.²³² Because most people in America may actually agree with the latter principle (that a convicted felon should not stand on the same level of credibility as other witnesses),²³³ however, his approach risks substitution of the views of elite decisionmakers for those of the body politic. By rejecting a principle apparently believed by many (I think most) of the denizens of his community of principle, Dworkin's interpretation could be incoherent with the underlying goal of law as integrity.

230. E.g., Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Peller, *supra* note 187, at 1187-91.

231. See *supra* note 210.

232. In his analysis of *TVA v. Hill*, 437 U.S. 153 (1978), Dworkin ultimately falls back upon the interpreter's view of the best policy, and justifies it on the ground that it is not refuted by clear legislative history to the contrary. R. DWORKIN, *supra* note 193, at 347.

233. Indeed, if we believe the current social psychology studies (e.g., attribution theory), we have every reason to believe that people do believe the Hogan argument.

3. Intersubjective Agreement

The central difficulty with theories resting upon strong definitions of truth is that American law rests upon a powerful tradition of moral skepticism. Moral skepticism is fatal to any theory based upon moral reality, and undermines coherence theories. Nor does recent jurisprudence suggest that American law will soon abandon this tradition. If anything, certain developments may exacerbate it. Much feminist theory and "different voices" scholarship argue for the contingency of values generally, and the oppressive background of many values long treated as neutral. CLS has developed an impressive analytic arsenal capable of deconstructing, trashing, and now even cannibalizing most legal or policy arguments. In short, any Normativist theory confronts overpowering difficulty in persuading modern intellectuals of its version of truth.

Hermeneutics, the philosophy of interpretation developed in Europe, offers a more modest approach to truth and a sounder basis for a practical Normativist theory of legislative history.²³⁴ Hermeneutics suggests that truth is the common understanding reached by an interpreter and a text about the case.²³⁵ Every historical text has an horizon, or context, in which it was fashioned (its legislative history, broadly defined to include everything leading up to the enactment of the text), as does its present-day interpreter. Traditional theory views the horizons of text and interpreter as separate and distinct. The role of the interpreter in traditional theory is that of a subject finding the object (the correct interpretation) in the text's horizon. Gadamerian hermeneutics views the horizons of both text and interpreter as more fluid, and suggests that interpretation is a dialogue between text and interpreter seeking common ground, a shared understanding of the truth of the statute as applied to the particular case.

Hermeneutics is strikingly different from traditional theory, because it views truth intersubjectively. It admits the possibility that the "best" interpretation will vary over time and even among interpreters. Therefore, it refuses to accept legislative history as a static thing waiting to be mined for the preexisting nugget that will resolve the interpretive quan-

234. Most of the discussion that follows is based upon my earlier work in Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990). See Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U.L. REV. 523 (1988); Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985).

235. See H.G. GADAMER, *supra* note 184, at xvi (translator's preface: "Instead of the binary implication of 'understanding' (a person understands something), Gadamer pushes toward a three-way relation: one person comes to an understanding with another about something they thus both understand.").

dry. Instead, a hermeneutical approach would use legislative history as a source of possibilities and ideas which can be productively examined by an inquiring interpreter in the context of the case at hand. Indeed, hermeneutics requires the interpreter to subject the horizon of the statute to critical scrutiny (does it make sense in the context of this case?), and in turn to learn from the text. Like any conversation, interpretation at its best is a to-and-fro interaction of interpreter and text.

Although hermeneutics is a confession that Normativist theories cannot realistically be very ambitious about their claims about truth, it is a confession that may facilitate productive interpretation, as in *Bock Laundry*. To begin with, hermeneutics reminds us of a central point of statutory interpretation that tends to get lost in discussions of grand theory. That point is that the facts of the case are important because they provide a testing ground for the assumptions made by the legislature, and an opportunity to test the interpreter's own reactions to the text. Focus on the record in *Bock Laundry* yields the surprising conclusion that the verdict should probably have been left alone, because any error in the trial court did not clearly prejudice Paul Green's right to a fair trial.²³⁶

Paul Green at the time of the accident was an inmate in county prison, serving terms for burglary and conspiracy to commit burglary. While in prison he worked for the Lemoyne Minit Car Wash, where his job was to operate machines that washed and dried towels for the other workers to use on the cars. The Bock Laundry water extractor was a large machine that dried the towels through a violent rotary motion. On direct examination, Green himself told the jury he resided at the county prison, where he was serving time for the two felonies.²³⁷ His story was that he was never given any warnings about not putting his hand in the extractor, and that other employees had told him how to slow down the machine by wrapping his hand in a towel and sticking it into the drum.²³⁸ The owner of the Lemoyne Minit Car Wash, Dolores Kelly (not a defendant in the case), testified that she warned Green not to put his hand inside the extractor,²³⁹ and the testimony of John Emerick, another prisoner and Green's co-worker at the car wash, was to the same effect.²⁴⁰ There was also evidence presented by both sides concerning the alleged defect in the extractor. The jury returned a verdict for the de-

236. FED. R. CIV. P. 61 (errors made in civil trial do not warrant new trial unless they violate "substantial rights" of the complaining party).

237. Transcript of Proceedings, Jury Trial 11, 12, 12 May 1987, *Green v. Bock Laundry Machine Co.*, 86 Civ. 0688. Reprinted in Joint Appendix to *Bock Laundry* (No. 87-1816), at 27-28.

238. *Id.* at 33-34, 36-39, 42.

239. *Id.* at 83-84.

240. *Id.* at 96.

fendant. On the special verdict form the jurors answered only question number one, finding that the product was not defective. Hence, they never had to answer question number four, which asked whether Green had assumed the risk of accident by his own behavior.

On *this* record, I doubt that the Supreme Court should have decided the Rule 609(a)(1) issue, because it is far from clear that exclusion of his criminal convictions would have helped Green, who had a pretty weak case and who testified himself as to his prison record at the time of the accident. Nothing in the record suggests to me that Green was denied a fair trial, although one thing in the briefs does so suggest. Green's brief asserts that defense counsel in opening argument emphasized Green's prior conviction for rape.²⁴¹ Assuming that this was in the record (which it technically was not), how might a hermeneutical interpretation work?

Like the Court in *Bock Laundry*, I would apply a clear text, even one with which I disagree, out of deference to the text (not to mention legislative supremacy). The text is not helpful on this issue, but the legislative history is, because it reveals that the textual ambiguity was the result of an oversight (Congress focused completely on criminal cases in the Senate and probably continued that focus in conference), and because it lays out for me the incomplete policy dialectic for this case, which I can then complete.

Recall the debate in Congress over whether criminal defendants can routinely be impeached by their prior convictions. The Hogan/McClellan argument was that a witness' bad acts reflect on overall character. The Dennis/Hart argument was that introducing such evidence is inherently prejudicial to the defendant's right to a fair trial. The conference bill accepted neither argument completely, for it adopted a balancing test (rather than the Dennis/Hart per se exclusion or the Hogan/McClellan routine admissibility), and made a stab at limiting the balancing test to certain players in litigation. Was the second limitation for the protection only of criminal defendants or of parties generally?

Given the focus of concern in the late stages of the debate, Justices Scalia and Stevens make a plausible argument that the text limits the rule to criminal defendants. That is the obvious initial impression, until you evaluate the rationality of that choice in light of the legislative dialectic. Is it rational to treat criminal defendants differently from civil plaintiffs? My initial reaction is that it is not. The Dennis/Hart argument is just as

241. Brief for Petitioner, at 11 n.1, *Bock Laundry* (No. 87-1816). The brief notes that the opening arguments were not transcribed. Respondent's brief does not dispute the assertion. If this were true, and Rule 609(a)(1) precluded mention of the rape conviction, I would find such an inflammatory statement grounds for mistrial.

strong, if not stronger, for civil plaintiffs as it is for criminal defendants. The civil plaintiff, like Paul Green, has the burden of persuasion, which all but compels the plaintiff to take the stand. Indeed, in a civil case the defendant can call the plaintiff as a witness²⁴² and then impeach her.²⁴³ If the plaintiff's character is called into question, the burden is that much harder to sustain for reasons usually unrelated to the merits of her claim. In contrast, the criminal defendant need only rebut the prosecution's case, and her refusal to testify cannot even be mentioned by the prosecutor. Thus, for the same reason the conference accepted the Dennis/Hart argument for criminal defendants in some cases (the balancing test), it makes sense to accept it for civil plaintiffs.

Just as the interpreter should not stop with the Court's analysis, so she should not stop with the analysis I have just made. Given the extra procedural protections afforded criminal defendants that are not afforded civil plaintiffs (e.g., right to counsel provided by the state), can Rule 609(a)(1) not be read as another one of those extra protections? I believe it *can*.²⁴⁴ By why *should* it be so limited? Unlike other extra protections afforded criminal defendants, the Rule 609(a)(1) balancing test carries with it no obvious social costs that would make it inappropriate for civil parties as well.²⁴⁵ Moreover, there is an interesting symmetry to providing Rule 609(a)(1)'s balancing inquiry to civil plaintiffs as well as criminal defendants. Both are often at a disadvantage in litigating against institutions with more resources at their disposal. Therefore, the policy of protecting vulnerable criminal defendants against possible undue prejudice strikes me as applying also to vulnerable civil plaintiffs such as Green. Finally, I must confess great normative problems with the Hogan/McClellan argument altogether. In light of social science theory and some practical experience, the argument has not been robust over time and has been the object of increasing academic criticism.²⁴⁶ To the extent that there is interpretive ambiguity, I am reluctant to apply the Hogan/McClellan argument expansively.

242. FED. R. EVID. 611.

243. *Id.* at 607.

244. At this point, I should subject the dichotomy in text to some scrutiny. Our system may overstate the differences between civil and criminal procedure, and the Supreme Court is pulling back on some of the extra protections afforded criminal defendants.

245. Thus, the exclusionary rule protecting criminal defendants against admissibility of evidence wrongfully obtained by the state bears significant social costs, in that guilty defendants may go free, thereby reducing the deterrence effect of criminal sanctions, fomenting cynicism in the system, and in a good many cases subjecting the defendants' next victims to harm and injury. If a similar exclusionary rule were used in civil tort suits, some of these costs would be incurred.

246. The academic criticism is collected in *Bock Laundry*, 490 U.S. at 511-20, and Foster, *supra* note 211, at 1-2.

My dialogue with the text would touch on the other issues already developed in this article—especially the concern that my interpretation not do violence to an apparent legislative compromise. The bottom line is that I would interpret Rule 609(a)(1) as excluding prior criminal convictions when prejudicial value to *any party*, not just to a criminal defendant, outweighs its protective value. Any mention of Green's rape conviction should have been excluded (and I would have ordered a mistrial if it were mentioned in opening argument, as Green claims). His burglary convictions probably should have been excluded as well. This result goes beyond original legislative compromise, because I have updated the text's horizon by reference to the case and to current social science evidence. This result takes me beyond my own preconceptions about Rule 609(a)(1), since I would have excluded any such evidence if I were writing the Rule. Even if I had adopted a balancing test, I would have excluded prior convictions where prejudicial value to the *witness* or a *party* outweighed its probative value. However, the legislative history persuades me to abandon that view.²⁴⁷

B. *The Political Theory Critique*

Apart from jurisprudential problems, the various Normativist theories of legislative history as evidence of meta-intent (truth value) are subject to the criticism that they make assumptions about the political process that are not realistic. A major problem for Normativist theories of statutory interpretation or legislative history is that they tend to present a romanticized vision of the political process. This vision presents substantial constitutional difficulties for Normativist theory if it cannot be demonstrated that the vision somehow corresponds to legislative reality. Otherwise, Normativist theory would call for a great deal more judicial activism than most theories of constitutional law would allow. I believe that Hurd's moral realist theory is most inconsistent with realistic theories of politics, and that hermeneutical theory is least inconsistent with such theories. Dworkin seems on the whole to be situated above the political fray, but his precept of integrity in legislation is vulnerable to the political theory critique as well.

1. Public-Spirited Legislators & Moral Realism

Hurd's natural law theory is not greatly concerned about the opera-

247. CONFERENCE REPORT, *supra* note 124, at 9. "The danger of prejudice to a witness other than the defendant (such as injury to witness' reputation in the community) was considered and rejected by the Conference as an element to be weighed in determining admissibility."

tion of the actual political process, but it seems to assume that legislators try to act in the best interests of their constituents and are generally guided by the "public interest" (optimal social arrangements), and not just "private interests."²⁴⁸ This assumption is probably necessary for her theory, but it is subject to numerous difficulties: it is descriptively naive, rests upon a questionable distinction, and is even subject to normative questions.

Any assumption that legislators are motivated exclusively or primarily by a Burkean notion of the public interest ought to be weighed against the substantial literature on political decisionmaking which strongly suggests otherwise.²⁴⁹ To begin with, political scientists depict a complex view of legislator motivation which cuts against Hurd's assumption. In his classic study, Richard Fenno found three motivations: reelection, power within the legislature, and contribution to sound policy.²⁵⁰ Other theorists assume or argue that the dominant, or the only important, interest of legislators is to be re-elected.²⁵¹ While this literature does not prove such an assumption, it has a superior predictive power than competing models (almost all of which themselves make more cynical assumptions than Hurd is willing to make). Case studies of the legislative process reveal that legislator motivation varies according to the issue, its public salience (media attention), and the array of interest groups concerned about the issue.²⁵² The inescapable conclusion is that the desire to be reelected is a substantial motivation for legislators, and I think it probable that this is their major motivation in most cases.

The private desire of legislators to be reelected ensures that statutes will reflect compromises and private interests most of the time.²⁵³ A legislator who wants to be re-elected today needs to raise a lot of money (usually by doing good things for interest groups), and to avoid antago-

248. See Hurd, *supra* note 197, at 1011 n.135.

249. Hurd's argument is that there are two schools of literature: public choice theory, which merely "assumes" that legislators are only interested in reelection, and public interest theory, which assumes otherwise. *Id.* at 1011 & n.135. This is a misleading description of the literature. There are in fact boatloads of case studies of specific pieces of legislation (starting with Professor Schattschneider's classic analysis of the Smoot-Hawley Tariff Act), and there are several sophisticated studies of legislator voting decisions (Professor Fenno's work is classic). See generally W. ESKRIDGE & P. FRICKEY, *supra* note 48, ch. 1 (collecting literature). None of these studies is cited. And virtually none of the actual studies endorses anything like Hurd's public interest approach.

250. R. FENNO, *supra* note 70, at 1 (1973); see Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 888-90 (1987) (updating Fenno analysis).

251. *E.g.*, M. FIORINA, *supra* note 138; D. MAYHEW, *supra* note 138.

252. See, *e.g.*, J. BIRNBAUM & MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987); C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT (1985).

253. The arguments in this paragraph are a summary of Eskridge, *supra* note 53, at 275.

nizing groups of constituents. Thus the legislator will aggressively push for pork barrel projects and other rent-seeking measures that profit important constituents, often at the expense of the general welfare. On controversial issues, the legislator will be more passive, out of a fear of antagonizing potential donor and/or voting groups. The legislator will support interest-group compromises or delegations to courts or agencies of the most controversial issues (unless she simply runs away and ignores those issues). Little of this activity leads to the creation of optimal social arrangements, especially when one sees that politically salient interest groups form selectively (and with a strong establishmentarian slant), and that legislative procedures permit even narrow interest groups to hold legislation hostage until they are bought off.

Rule 609(a)(1) is typical of the compromise nature of most American legislation, and for that reason it is hard to argue that it is the best rule for dealing with prior convictions (however one resolves the *Bock Laundry* issue). Hurd's assumption has virtually no descriptive support, but of course it could represent a "hopeful" normative aspiration for American politics. Hurd does not make any sustained normative argument for it (yet), and to do so she would have to overcome the strong pluralistic tradition in our society. Pluralism normatively defends interest-group politics on the ground that it ensures through vigorous politics that our society will remain moderate and stable in the long run.²⁵⁴ This is a normative goal that may well be debated, and surely there are other goals that might be posited, such as justice and fairness. But the pluralist tradition cannot be ignored in any descriptive *or* normative debate about American politics.

2. Checkerboard Statutes & Integrity in Legislation

Dworkin's theory of legislation strikes me as a theory that carefully avoids making strong claims about how the legislative process works, but it also arguably assumes a more public-spirited view of the legislative process than is justified by the evidence. For example, Dworkin makes at least one important assertion that is questionable, though he may qualify it carefully enough to avoid outright error. His "community of principle" sees integrity—the coherence of law on matters of principle—as an important public virtue.²⁵⁵ "Integrity in legislation" for such a community is the idea that statutes should not make unprincipled distinctions

254. *E.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); D. TRUMAN, *supra* note 136; Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 734-38 (1983).

255. R. DWORKIN, *supra* note 193, at 206-24.

among citizens. It appeals to our aversion to "checkerboard statutes," which make such unprincipled distinctions.²⁵⁶ For Dworkin, the best theory of what our political community can be is a community of principle, and in such a community legislators will avoid checkerboard statutes.

This claim is an oversimplification of our political culture. On the whole, Dworkin seems to underestimate the role of compromise in the legislative process. He admits that the community of principle might rightly be willing to make unprincipled distinctions in order to get an otherwise controversial but just bill through the legislative process,²⁵⁷ but the admission seems to assume that this is, or can be, somehow exceptional. Given our diversity of political viewpoints, the proliferation of interest groups, and the many procedural roadblocks to legislation, virtually any statute that is enacted to deal with an important public problem is going to include arguably unprincipled tradeoffs, such as exemptions for certain groups whose support is needed, compromises and ameliorations of the statute's policy to attract fence-sitters, and secret logrolls to buy off opposition.

Rule 609(a) is a checkerboard statute which makes several unprincipled compromises, starting with including the overbroad distinctions among *crimen falsi* (always admissible for impeachment), lesser crimes (never admissible), and important felony-type crimes (admissible under a balancing test). *Bock Laundry* added a further distinction in the third category, between criminal defendants and all other litigants. Dworkin not only underestimates the frequency of this sort of deal-cutting, but overstates our aversion to this sort of checkerboard statute. The House conferees grumbled about its second-best nature, but all of the House conferees endorsed the compromise.²⁵⁸ There is every reason to believe

256. *Id.* at 178-84.

257. *Id.* at 217-18.

258. In defending the conference substitute before the full House, Representative Hungate made the typical defense: I must say that, in all fairness, neither the House nor the Senate 'won' at the conference. The real winner is the Federal judicial system. A spirit of compromise and accommodation ran throughout the conference sessions and enabled us to do our work quickly, yet thoroughly and fairly." 120 CONG. REC. 40,890 (1974). To be sure, this might be just empty rhetoric, but it is noteworthy that the House debate on the conference substitute was not at all strident (as it had been on the House bill) and the bill sailed through overwhelmingly, suggesting general satisfaction with a compromise rather than no bill at all. Even Representative Dennis, who had fought long and hard for a rule barring admissibility of prior criminal convictions in civil cases, admitted: "So, while [the final version of Rule 609] is not what I wanted to do . . . it is a good deal better than where we have ever been, and I have accepted the compromise." *Id.* at 40,894. Representative Hogan, who had vociferously opposed Dennis on this issue, agreed: "I am sure neither [Representative Dennis] nor I are totally happy with this compromise, as is true of all other compromises. But I think it is a reasonable compromise, and it would be a calamity, in my view, if these rules failed to be enacted into law." *Id.* at 40,895.

that in the many instances where two opposing but coherent viewpoints square off in Congress (as with the Dennis/Hart view versus the Hogan/McClellan), and where the result is an unprincipled compromise between the two viewpoints, the participants and the informed citizenry not only accept the compromise but are happy with it.²⁵⁹

There are three basic problems with Dworkin's descriptive claim that we don't like checkerboard statutes, because not only do we in fact often like them, but we usually prefer them to likely alternatives. First, as just noted, checkerboard patterns are necessary to enact most legislation. If (as with the Rules of Evidence) we all want a statute to get passed, we are happy to accept unprincipled compromises. This is a much bigger limitation than Dworkin seems willing to admit. Second, this problem usually gets worse over time, as new compromises accumulate and old ones rarely get repealed. The persistence of old, and often obsolescent checkerboard compromises is due to legislative inertia, the difficulty to repeal, the pull of vertical coherence and tradition in our instincts, reliance interests, and our greater reluctance to take things away from people than to give them new things. Third, our different intensities of preference make us much more receptive to checkerboard statutes than Dworkin seems to think. Most Americans are happier with a system in which their most intense preferences are satisfied, usually through a checkerboard statute or checkerboard pattern of implementation, even at the price of satisfying other people's most intense preferences in a similar way. For all its normative problems, eloquently articulated by Dworkin, this is one great advantage of the pluralist political process. Dworkin has not demonstrated that he understands "our instincts"²⁶⁰ better than pluralism does.

3. Hermeneutics and a Realistic View of Politics

The foregoing analysis suggests that Normativist theories of legislative history resting upon strong definitions of truth tend to accept a romantic, even utopian, view of politics that is today quite untenable. Compromise and willingness to give up the best for the good are inherent in our political system. Obviously, that is not fatal to Normativist theory. Dworkin and Hurd might ultimately conclude that their theory seeks to transform our political system, or encourage judges to make it better.²⁶¹ However, that attempt would greatly exacerbate the constitu-

259. Dworkin concedes this possibility in R. DWORKIN, *supra* note 193, at 179-83.

260. *Id.* at 182.

261. The latter strategy, unhappily, encounters many of the same objections, based on a realistic

tional problems suggested in the next section.

Hermeneutics suggests a more modest approach. Compromise, rather than moral reality or integrity, is inherent in the process of interpretation just as in the process of legislation. Practical reasoning means sometimes avoiding an interpretation when the case does not call for one (no prejudicial error in *Bock Laundry*), accepting most of the text's policy judgments and unprincipled distinctions even while questioning others (Rule 609(a)(1)'s questionable distinction between defendants and other parties or witnesses), and working out the truth one case at a time rather than from a grand system. The weak Normativist theory inspired by hermeneutics might be said to carry forth into the future the discussions behind legislative compromises, and therefore, to preserve the main goals of pluralism, but with greater appreciation for the competing goals of coherence, justice, and fairness (Dworkin's very appealing triad of goals).

C. *The Constitutional Critique*

In my view, the political theory critique of Normativist theories of legislative history pushes those theories toward the admission that interpreters take a strong role, transforming intractable materials in the direction of the normative goal (moral realism, law's integrity). Dworkin, for example, revealingly calls his interpreter Hercules, and strikingly contrasts him to the nameless legislators who form the background chorus in his work. Hurd is willing to go further. To her moral realist judge, "[l]egislation that is backed only by log-rolling, political compromises, or self-interest on the part of legislators will thus be entitled to little authority."²⁶² In short, Hercules and the moral realist would, if they really took these theories to heart, completely rewrite Rule 609(a)(1).

Such a strong role for nonelected interpreters (judges) might be criticized as judicial usurpation of the legislature's role, and therefore contrary to legislative supremacy.²⁶³ I think this constitutional critique has greater force against Hurd and Dworkin than it does against Hart and Sacks, or against a hermeneutical theory of the role of legislative history in interpretation. Nonetheless Dworkin and Hurd can rely on some of the same arguments that have been advanced for the legitimacy of Hart and Sacks' approach.

view of the power politics involved in judging. See, e.g., Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982).

262. Hurd, *supra* note 197, at 1000.

263. The best explication of this rule is Farber, *supra* note 158, at 281.

To begin with, it is not clear that the Constitution subordinates the role of the judiciary to one of the agents doing the bidding of congressional principals. The division of governmental power into three co-equal, coordinate branches of government by Articles I-III, in fact, suggest otherwise—that judges interpreting statutes are more like “partners” with the legislature and the executive in the ongoing enterprise of government, than they are like “agents” implementing the directives of the legislative principal. As the Realists argued,²⁶⁴ the partnership metaphor makes sense of the constitutional separation of powers, in which the legislature writes statutes and courts interpret them.

Additionally, the new jurisprudence of interpretation provides fresh support for the partnership metaphor. Hermeneutics suggests that interpretation—especially legal interpretation—is inevitably an interaction, a dialogue, between the text and the interpreter. If approached in the proper spirit of openness and inquiry, the conversation is one in which neither perspective is dominant. The result of the conversation is truly collaborative. It creates a common ground between the interlocutors. If hermeneutics is right about the essential nature of interpretation, the Realist notion that judges are partners in government has great force.

Of course, the objection remains that Dworkin’s Hercules and Hurd’s moral realist end up being a great deal more than just partners with the legislature. Their theories threaten to liquidate the partnership and replace it with a proprietorship of the judiciary. I think they would respond by emphasizing the partner’s ultimate duty to the goals of the enterprise—moral realism or integrity. Note, further, that even if one rejects the partnership metaphor for statutory interpretation, and falls back on the agency one, the legitimacy of the truth value is not necessarily lost.

Our interpreter as partner in this context is operationally similar to the relational agent. While we might say (as I did above) that the relational agent carries out the principal’s orders creatively, there is a strong sense in which relational agents—like partners—are judged by the truth of their decisions. The relational agent who slavishly follows the letter and even the spirit of the principal’s orders into heavy business losses will probably be fired (and in my view ought to be), just as the partner who mechanically carries out the enterprise into bankruptcy will be shunned by businesses in the future. Conversely, the relational agent who stretches the principal’s order to snatch up a business opportunity is often (albeit not always) rewarded, and the partner who stretches the

264. See *supra* text accompanying notes 88-93.

partnership goals when business necessity demands it will be a sought-after associate. The point is that all these actors are ultimately and properly judged mainly on the basis of their ability to make the relationship work productively—their ability to see the truth of the situation. So too it might be with judges. It should not be unconstitutional for them to find the truth of the situation and implement it, within statutory conventions.

CONCLUSION

This Article identifies three values that legislative history might serve for the statutory interpreter: (1) authority value, as evidence of the legislature's specific and authoritative intent when it enacted the statute; (2) purpose value, as evidence of the legislature's general intent, its policy goal or purpose; and (3) truth value, as evidence of the legislature's meta-intent that statutes contribute to the constructive development of law. My analysis seeks to identify the jurisprudential evolution in academic theorizing about legislative history. Where does all this analysis leave us?

On the one hand, it provides some (but not unequivocal) support for the New Textualist critique of legislative history. Legislative history's most commonly invoked value, as evidence of specific legislative intent, is the most vulnerable to a wide variety of critiques. Other more recently emphasized values are also subject to question. Thus, the New Textualists have plenty of arguments for their position that legislative history is of questionable value. The problem my analysis presents for them, however, is that several of the criticisms of legislative history values (especially the jurisprudential criticisms) can also be invoked against the New Textualism.

On the other hand, my analysis also provides some support for the more eclectic approach of Practical Legal Studies.²⁶⁵ That school, of which I am sort of an *ad hoc* member, would argue that legislative history can serve any or all of these values depending on the case. Recall my example of *The Federalist Papers*.²⁶⁶ Notwithstanding significant theoretical objections to their invocation, they often provide very practical guidance for very simple reasons, and the same can be said for the legislative history of many statutes. Just as Madison's essays carry some

265. See Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1989) (correspondence describing a centrist movement Professor Feinman dubs "Practical Legal Studies," or "PLS" for short [compare "CLS"]).

266. See *supra* text accompanying note 201.

weight simply because they were written by someone who helped draft the Constitution, so some legislative history has some authoritative force in argumentation. Just as the *Federalist's* defenses of constitutional choices are often persuasive evidence of constitutional policies, so legislative history can sometimes provide guidance to the statutory interpreter by giving an indication of widely shared designs. And just as the essays by Madison and Hamilton set forth insightful views about political theory, legislative history is often illuminating for its normative value. An interpreter's study of legislative history serves a variety of values and, at bottom, ought to resist pressures to conform to a procrustean theoretical framework. The pragmatic lesson for my historical exegesis is that dogmatic positions on the use of legislative history are not productive in our representative democracy.